IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 43

INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*, *Appellants*,

vs.

HOBOKEN MANUFACTURERS RAILROAD COMPANY, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE, HOBOKEN MANUFACTURERS RAILROAD COMPANY

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Opinions Below

The opinion of the specially constituted District Court (R. 109) is reported in 47 F. Supp. 779.

The decision of the Interstate Commerce Commission (R. 32) to review which the action was instituted, was rendered in *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y. Ry. Co.*, Docket No. 27630, and was reported in 234 I. C. C. 114.

As to the Jurisdiction of this Court

The action in the Court below was brought under the provisions of acts approved June 10, 1910 (38 Stat. L. 1149), and October 22, 1913 (38 Stat. L. 219), commonly referred to as the Commerce Court Act and the Urgent Deficiencies Act, all as re-enacted in Title 28, U. S. C. A. Section 41(28) and Sections 43-48, inclusive, having to do with suits brought to enjoin and set aside orders of the Interstate Commerce Commission.

The fact that the Commission's order was negative in form does not deprive the courts of jurisdiction, *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125; *Alton R. Co.* v. *United States*, 287 U. S. 229.

The direct appeal from the final decree of the Court below was taken to this Court under the provisions of U. S. Code, Title 28, Sections 47a and 345.

Probable jurisdiction was noted by this Court on May 3, 1943 (R. 658).

The Statutes Involved

The proceeding before the Interstate Commerce Commission was instituted under the provisions of Sections 1(4) and 15(6) of the Interstate Commerce Act (49 U. S. C. A., 1(4) and 15(6)). These are reproduced in the Appendix.

The Questions Involved

In a proceeding in which the Interstate Commerce Commission was called upon to determine the divisions between the appellee, a switching line, and its trunk line railroad connections of lighterage-free rates paid by shippers, which included compensation to the railroads for loading and unloading cars in connection with the interchange of freight with steamships, where the Commission correctly proceeded upon the theory that the appellee, being a switching line, was entitled to divisions which would cover the full costs of its service, and where the appellee had entered into a

contract with a water carrier, Seatrain Lines, Inc., for an interchange arrangement whereby the loading and unloading of freight into and from railroad cars in accomplishing interchange was eliminated and the railroads were saved this labor and expense, and whereby additional traffic was secured by the appellee,

1. Did the District Court err in sending the proceeding back to the Commission for consideration and finding as to the value to the appellee and its trunk line connections of the benefits and savings derived by them from the interchange arrangement and as to the amount of the reasonable compensation, if any, which it would be consistent with the efficient and economical operation of the appellee for it to pay to Seatrain in consideration of the benefits of the interchange arrangement and to determine the division of the rates to be received by the appellee in the light of including such reasonable payments in the full cost of its service?

2. Did the Commission err in excluding, for the reasons stated in its report, any payment to Seatrain as a part of appellee's full cost and in failing and refusing to consider and make a finding as to the amount of such payment, if any, which would be reasonable and consistent with the efficient and economical management and operation of the appellee in consideration of the benefits and savings secured by it and its trunk line connections from the interchange arrangement?

Statement of the Case

A. The Nature of the Action

The action was instituted by appellee in the Court below to review and set aside an order of the Interstate Commerce Commission dismissing a complaint filed with it by the appellee, hereafter generally referred to as the Hoboken. The United States was named defendant as required by the

statute and the Interstate Commerce Commission and the trunk line railroad appellants intervened (R. 57, 64).

By its complaint (R. 22-32), the Hoboken had asked the Commission to determine and prescribe the just and reasonable division between it and its trunk line railroad connections, respectively, of joint through rates, known as lighterage-free rates, for rail transportation to and from New York Harbor, including the waterfront of Hoboken, N. J., as applied to freight interchanged by the Hoboken with the vessels of Seatrain Lines, Inc., a water carrier, hereafter referred to as Seatrain. The complaint alleged that the division of 60 cents a ton which the trunk line railroads had allowed to it out of these rates was inadequate and unjust to it, and that by retaining the balance for themselves the trunk lines were retaining unreasonable, unjust and excessive divisions. In particular, the complaint alleged that the division of 60 cents was inadequate since it did not cover Hoboken's costs, including payments made by Hoboken to Seatrain under certain contracts pursuant to which Seatrain had established its terminal at Hoboken and had agreed to interchange freight with Hoboken by means of Seatrain's special devices which saved Hoboken the burden and expense of providing cars and loading freight into and unloading it from cars, services which the railroads undertook and for which they were paid by shippers in the lighterage-free rates. Since Seatrain had acquired Hoboken's stock after the agreement had been arrived at in principle, Hoboken by its complaint asked the Commission to scrutinize the contracts and determine whether the compensation to be paid to Seatrain thereunder was reasonable *in consideration of the savings in labor and expense and the added traffic produced for Hoboken* by reason of the arrangement and, if not, to determine what would be reasonable compensation consistent with the efficient operation of the Hoboken.

The Commission, after hearing, failed to consider and determine what would be reasonable compensation for Hoboken to pay Seatrain for the *benefits* of the interchange arrangement *to Hoboken*, but dismissed the com-

plaint, excusing its failure and explaining its dismissal on various grounds presently to be considered.

Hoboken then instituted this suit. By its petition (R. 2-57), it alleged that the Commission's decision and order dismissing its complaint were arbitrary and based on errors of law; that the reasons given by the Commission for excluding the payments by Hoboken to Seatrain under the contract from Hoboken's legitimate costs to be reimbursed by the division to be allowed to it by the trunk lines out of the joint through lighterage-free rates, were unsound as a matter of law; that in resting its decision entirely upon its finding as to the location of the point of interchange the Commission erroneously ignored the effect of the arrangement upon the operations of Hoboken in eliminating labor and expense on its part and in bringing it additional traffic; that among other things the Commission erred in rejecting the contracts as evidence of any obligation to make the payments because of Seatrain's ownership of Hoboken's stock, and that, instead, it should have considered and determined whether the payments were reasonable and consistent with the efficient operation of the Hoboken, in view of the benefits and savings derived by Hoboken from the interchange arrangement. Finally it was alleged that the order of the Commission was confiscatory since it had the result of requiring Hoboken to continue to operate for compensation less than its costs. The Court was asked to annul the Commission's order dismissing the complaint and to direct the Commission to reinstate the proceeding, to make findings on the questions referred to it and to render its decision on the basis thereof.

It is important to realize at the outset that, contrary to the assertions in appellants' briefs around which their whole arguments are constructed, Hoboken did not ask the Court below to substitute its judgment for that of the Commission on a matter peculiarly within the Commission's function—the determination of the point of interchange between Hoboken and Seatrain and the extent of the movements covered by the railroad freight

rates. Admittedly on this question the decision of the Commission, if supported by evidence, was final. *Atchison, T. & S. F. Ry.* v. *U. S.*, 295 U. S. 193; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. However, on this matter, there was no dispute for the Commission to decide, since the point of interchange was settled by the agreements between Hoboken and Seatrain. What was argued by Hoboken in the lower Court was that the Commission failed to fulfill its duty in the proceeding in not evaluating and determining what would be reasonable compensation for Hoboken to pay Seatrain for the savings in labor which Hoboken enjoyed in performing its rail undertaking on the railroad side of the interchange point, and in not considering the divisions to be received by the trunk lines and Hoboken respectively in the light of the "windfall" which they received as the result of the arrangement with Seatrain.

The Court below upheld these contentions. It did not, we repeat, substitute its judgment for that of the Commission. Instead it sent the proceeding back to the Commission and directed the Commission to consider and render a decision on the matter which the Commission had evaded—the value if any to the Hoboken and its trunk line connections, of the benefits to them from the arrangement with Seatrain and what would be reasonable compensation for the Hoboken to pay to Seatrain therefor, consistently with the efficient and economical management of Hoboken.

B. The Facts

Although the briefs of both the Commission and the railroad appellants (hereafter called trunk lines) contain statements of the facts, it is believed that an understanding of the issues and of the appellee's position will be aided by a brief restatement of the salient features of the case.

1. APPELLEE HOBOKEN

The Hoboken is a short switching railroad, whose line extends along or near the waterfront at Hoboken, New Jersey. It serves numerous steamship piers, industries, and private side tracks, and at its northern end connects with the tracks of the Erie Railroad and through the Erie Railroad indirectly connects with the other trunk line railroads reaching New York Harbor. Freight originating at interior points on the lines of the trunk line railroads or their connections, consigned to industries, side tracks or steamship piers in Hoboken, is moved in cars to the interchange track between the Erie and the Hoboken and is then switched by the Hoboken to the industry, side track or steamship pier to which the freight is destined. Similarly, freight originating at industries in Hoboken or brought to Hoboken by steamships docking at piers served by the Hoboken for shipment to destinations in the interior is loaded into cars placed by the Hoboken, which are then switched by it to its interchange with the Erie Railroad and transported thence over the lines of the appropriate trunk line railroads (R. 109, 157-60, 184-85).

2. FREIGHT RATES IN GENERAL

The freight charges for the transportation of freight between interior points and Hoboken are based on single unit rates, covering the entire transportation between the interior and the point of delivery or loading on Hoboken's line and, with minor exceptions immaterial here, are the same as the freight rates on freight for delivery or originating at all points in the New York Harbor area (R. 110, 176, 183).

3. LIGHTERAGE-FREE OR SHIPSIDE RATES AND THE RAILROADS' OBLIGATIONS THEREUNDER

The freight rates are of two general categories. First, there are so-called shipside or lighterage-free rates, with which alone this proceeding is concerned. Under these

rates, it is the undertaking and obligation of the railroads to deliver freight consigned to or in care of a steamship docking in New York Harbor alongside the vessel within reach of and in such a manner that it is available to the ship's tackle. A railroad may do this by unloading the freight from the car, placing it on a lighter, and moving the lighter alongside the ship or the ship's pier. (It is for this reason that the rates are called "lighterage-free", since no extra charge in addition to the rates is made to shippers for unloading freight from or loading it into cars or for the lighterage movements or handling the rates themselves including the compensation for these operations.) If the vessel is at a pier served directly by a railroad track, the railroad serving the pier completes the obligation under these rates by switching the car to the pier and unloading the freight from the car and moving it to the foot of ship's tackle alongside the ship. Accordingly, when the pier is one served by Hoboken, it switches the car from the Erie interchange to the steamship pier and unloads the freight from the car and places it at the foot of ship's tackle. In the case of freight moving in the reverse direction, that is, brought to New York Harbor by steamship and destined for rail movement to the interior under lighterage-free rates, the railroads' obligation is similar except that the operations are reversed, freight being received by the railroad performing the terminal service at the foot of ship's tackle, either on a lighter moved to ship's side by the railroad or on the pier alongside the ship, and thence being handled to a railroad car and loaded into the railroad car by the railroad or at its expense. Hoboken generally performs these obligations of loading, unloading and handling freight delivered to and received from ships docking at piers served by it, by employing the ship's stevedores and compensating them or the steamship company for their labors (R. 111, 193, 194, 225, 259-266).

4. NON-LIGHTERAGE-FREE RATES

The other category of freight rates consists of what may be called non-shipside rates. Under these rates, the undertaking of the railroads is limited simply to the place-

ment of a car upon a track, where it can be unloaded by the consignee or loaded by the shipper. If a railroad performs the loading or unloading for the shipper or consignee, an extra charge is made therefor (R. 158, 185, 193, 194, 225). These rates or the divisions thereof are not involved in this proceeding (R. 111).

5. HOBOKEN'S DIVISIONS OF THE FREIGHT RATES

When the switching service of Hoboken is employed in connection with freight originating at or consigned to points served by its line it receives its compensation therefor in the form of so-called divisions or proportions of the through unit freight charges. The total freight charges are generally collected by the trunk line railroads and Hoboken's division or proportion thereof is remitted to it by them.

Since 1920, Hoboken has had an agreement with the trunk line railroads providing, so far as is here pertinent, the following basis of divisions to be received by Hoboken on the kinds of freight indicated (R. 159; Exhibit "2", R. 457):

Carloads loaded or unloaded by H. M. R. R. (Hoboken) or at its expense	$1.35 per ton[1]
Carloads loaded or unloaded by shipper or consignee or at their expense	.60 per ton[1]

The difference of 75 cents represents approximately the cost to Hoboken of loading and unloading freight into and from cars for which service the trunk lines are paid by shippers in the lighterage-free rates.[2]

[1] When the through unit freight charges were increased by certain percentages under authority of the Interstate Commerce Commission, Hoboken's divisions were correspondingly increased by the same percentages, the division of $1.35 becoming $1.49 or $1.42 and the division of 60 cents becoming 66 cents or 63 cents. For convenience, however, in the discussion herein the original figures will be used.

[2] Hoboken's contracts with Holland America Line stevedores and others provide payments ranging from 70 to 75 cents per ton as its cost of loading and unloading cars and handling to and from ship's tackle (Exhibits "20", R. 515, "21", R. 519; R. 259-264).

6. SEATRAIN

Prior to 1932, the steamships operating to and from New York Harbor, including Hoboken, with which the railroads interchanged freight, were cargo vessels of the ordinary type, which are commonly referred to in railroad parlance as break-bulk ships, for the reason that in order to deliver to them freight moving to the port by railroad, it is necessary to break the bulk of the car, unload the freight from the car, and place it loose alongside of the ship within reach of ship's tackle.

In 1932, however, a new type of steamship came into the New York Harbor picture. Seatrain, and its predecessor, Over-Seas Railways, had developed a form of ocean-going freighter equipped with railroad tracks for the transportation by water of freight in railroad cars and had acquired rights to use certain special terminal facilities to accomplish the transfer between a railroad serving a pier and its vessels of freight in the cars used for rail movement, thereby eliminating the furnishing of the car itself at the port and the labor incident to loading and unloading cars. This company and its predecessor had been operating between New Orleans and Havana since 1929 and in 1931 began arrangements for the establishment of a service between New York Harbor and New Orleans via Havana with two new ships being constructed for the purpose (R. 211-214, 226-232).

Briefly, Seatrain's vessels are large, fast, cargo-carrying ships of approximately 10,000 tons, with four decks and four lines of track on each deck. When fully loaded each ship can carry 100 cars.* The handling device consists of a large crane or car elevator, constructed on the pier or trestle alongside which the vessel docks. A track extends along the trestle and in this track, opposite the hatch of the vessel, is a well into which fits what is described as a cradle. The "cradle", which will be frequently referred to herein, is, in effect, a short bridge member with a track on it

* One ship has a capacity of 95 cars.

the length of a car. In accomplishing transfer between the railroad and the ship, the cradle is placed in the well, and the car containing the freight is shoved onto the cradle; then the cradle is hoisted by the elevator over the side of the vessel and lowered into the hold until it is level with the deck on which the car is to be carried, where the car is hauled off the cradle by a winch and jacked in place on the ship. There is one cradle for each track on each deck of the vessel and as the loading of each deck is completed, the cradles are left in place flush with the deck, each cradle carrying a car and closing the hatch. In unloading freight from the ship the operation is reversed (R. 34, 110), *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219. The ship, cradle, pier and method of operation are shown in the photographs of record (Exhibit "9", R. 462-468).

7. EVENTS PRECEDING THE CONTRACTS BETWEEN HOBOKEN AND SEATRAIN

In 1931 Seatrain began negotiations for the establishment of a service to and from New York Harbor. It first sought a location for a terminal at some point served directly by one or the other of the trunk line railroads. The use by Seatrain of its specially designed ships and its crane and cradle would make possible the interchange of freight in cars and save the railroads the expense and labor of furnishing cars and of loading and unloading freight into and from cars. Since the railroads collected rates from shippers which included compensation to them for these expenses which they would be saved Seatrain considered that they should compensate it for the savings and advantages which they thus secured. Seatrain's first proposal to the trunk lines with whom it originally negotiated for a terminal in New York Harbor was that this savings should be divided equally with the railroads (R. 211-214, 226-232).

Seatrain's president, Mr. Graham M. Brush, called as a witness, testified without contradiction:

"In all these discussions, Seatrain had taken the position with the railroads, upon the establishment of the Seatrain service. In interchanging freight between the rail lines and Seatrain ships, it was a part of Seatrain's invention, and a part of Seatrain's investment in its invention, and constituted a means whereby, in certain instances, materal savings could be made in interchange, and Seatrain was willing to utilize its invention and its investment so as to make those savings, and we felt that those savings should be divided on a fifty fifty basis.

Q. By savings, you mean savings in the expense of interchanging freight between a railroad and a water line?

A. That is correct. In other words, to be more specific, if a water line should invest in certain equipment, either in a terminal or in ships, or a combination of terminal devices, and especially constructed ships, it is possible—in fact, it is very frequently done by the steamship lines—to make savings in this interchange, provide better service for rail and water.

Seatrain had done the same thing, only it had gone a little bit further than many of the other water lines.

Now, the reason we felt that these savings should be divided between the rail and the water line was because we felt that it would be of advantage to both carriers, primarily to Seatrain, to encourage the railroads to work with Seatrain.

It would give them ways and means to help the competition with our route, rail and Seatrain route, versus truck and water route, or barge and water route." (R. 212-213)

Proof was offered before the Commission that a payment by the trunk lines to Seatrain in an amount which would result in dividing the savings in labor and expense to the trunk lines was one of the terms on which negotiations with the trunk lines for a terminal were conducted, and that no exception was taken by them thereto. Over Hoboken's

protest such evidence was excluded by the Commission's Examiner as irrelevant* (R. 212-216).

It was determined, however, that Seatrain should seek a location for its terminal on the line of some neutral railroad. It turned to the Hoboken.

8. NEGOTIATIONS BETWEEN SEATRAIN AND HOBOKEN LEADING TO THE CONTRACTS PROVIDING FOR THE PAYMENTS IN DISPUTE

At that time Hoboken was under entirely separate management and ownership, being controlled by the P. W. Chapman interests (R. 223, 224).

Seatrain took up with the then management of Hoboken the question of locating a terminal on its line. In these negotiations, it took the position that in consideration of the benefits which would accrue to Hoboken, Hoboken should make a contract with Seatrain covering the interchange as it had done with other water lines docking at Hoboken and should make a payment to Seatrain in consideration thereof. It was suggested that the payment, instead of being 70 to 75 cents, which was paid to other steamship lines, should be 40 cents, which would enable the Hoboken to arrange for a division from the trunk lines of only $1.00 instead of $1.35, thereby dividing the labor savings and benefits with the trunk lines. The Hoboken's management agreed to the proposed arrangement (R. 222-228).

After this agreement had been reached, it developed that Hoboken was in a serious financial condition, that its stock was in the hands of trustees for liquidation, that it was without the funds necessary to rearrange its properties to permit the installation of the facilities required for the interchange with Seatrain and, indeed, that its continued operation was doubtful. Under the circum-

* This is significant in view of the fact that when it made its decision one of the reasons given by the Commission for disallowing the payments made by the Hoboken as part of its costs was that there was no proof that any independent railroad had ever agreed to make such payments to Seatrain (R. 48, 116).

stances, Seatrain purchased the outstanding stock of Hoboken from the trustee in liquidation and under an arrangement with Hoboken's landlord, the Hoboken Land and Improvement Company, advanced to Hoboken a considerable sum of money to enable it to make the necessary rearrangements and installations for the handling of freight to be interchanged with Seatrain's vessels (R. 228-231). *Hoboken Mfrs. R. Co. Notes,* 189 I. C. C. 29.

Then there were entered into between Hoboken and Seatrain several contracts, among them: (a) a lease from Hoboken to Seatrain of a pier with supporting tracks and a small locomotive; and (b) a contract in the terms of the agreement already reached with Hoboken's previous management, fixing the point of interchange of freight between Hoboken and Seatrain, determining their respective responsibilities therefor, obligating Seatrain to accept freight when delivered to it in cars on the cradle of its car elevator alongside its ship and relieve Hoboken of the necessity of unloading freight from cars and, similarly, to deliver freight for movement by Hoboken in railroad cars on its cradle, relieving Hoboken of the necessity of furnishing a car for rail movement and loading the freight into a car, and providing that in consideration of Seatrain's undertaking and the benefits received by Hoboken it should pay Seatrain 40 cents per ton on all freight so interchanged (R. 231-233, Exhibits "10", R. 469; "11", R. 50). There was also a third contract, not in evidence in this proceeding but described by the Commission in its report in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 219, which the Commission by reference incorporated in its decision here as its description of the method of interchanging freight with Seatrain (R. 37). As to this third contract the Commission found in the proceeding referred to (p. 225):

> "Seatrain has a contract with the Hoboken covering the interchange and supply of freight cars and the payment by Seatrain for the use of the cars, for insurance, and for settlement of loss and damage

claims. This agreement also provides for the return by Seatrain of empty cars."

Later, in view of the attitude of the railroads and the further fact that freight interchanged with Seatrain proved to be of somewhat different character than had originally been contemplated, a new contract was substituted for the old one, providing that instead of a payment of 40 cents a ton on all freight Hoboken should pay Seatrain 73 cents a ton but only in the case of freight moving under lighterage-free rates, pursuant to which Hoboken was obligated to assume the expense of loading and unloading freight from cars and interchanging with steamships at the foot of ship's tackle (R. 257-266; Exhibit "19", R. 53).

9. CONTROVERSY BETWEEN HOBOKEN AND THE TRUNK LINES

The old agreement of 1920 between Hoboken and its trunk line connections fixing the basis of divisions of through rates to be received by it, is not applicable to freight interchanged by Hoboken in railroad cars with the vessels of Seatrain for the reason that this old agreement fixed Hoboken's divisions only on freight loaded or unloaded to or from cars either by Hoboken or at its expense or by the shipper or consignee, whereas freight interchanged with Seatrain in cars is obviously not loaded or unloaded at all. In the absence, therefore, of any prior agreement with its trunk line connections, Hoboken sought an agreement with them as to the basis of dividing the through freight charges on freight interchanged with Seatrain. In the light of the fact that the original agreement between Hoboken and Seatrain previously referred to fixed the amount of the payment to Seatrain at 40 cents per ton instead of from 70 to 75 cents paid by Hoboken to other steamship lines or their stevedores, Hoboken proposed to the trunk lines that its division or proportion of the through charges on Seatrain freight should be $1.00 per ton instead of $1.35 per ton, Hoboken's

usual division on freight interchanged with steamships, thereby splitting with them the advantages of the savings made possible by the elimination of loading or unloading through the use of Seatrain's devices. Later, when the contract between Hoboken and Seatrain was changed, as previously described, to provide payment to Seatrain of 73 cents per ton only on freight moving under lighterage-free or shipside rates and no payment at all on freight moving under non-shipside rates (involving no obligation on the part of the railroad beyond placement of the car for the shipper to load or unload), Hoboken similarly changed its claim regarding its divisions, contending that it should receive a division of $1.35 out of lighterage-free or shipside rates but would agree to accept a division of only 60 cents on freight moving under non-shipside rates. The trunk lines, however, refused to agree with Hoboken on either basis sought by it and insisted on paying to it as its division on all freight interchanged with Seatrain only 60 cents a ton, representing only the Hoboken's switching expense, and on keeping for themselves the entire savings in labor costs resulting from Hoboken's arrangement with Seatrain and its method of interchange (R. 231-279; Exhibit "24", R. 523, 524).

Hoboken then filed its complaint with the Interstate Commerce Commission, asking the Commission under the provisions of the Interstate Commerce Act to determine and prescribe the just, reasonable and equitable divisions to be received by it out of the joint through lighterage-free rates for its portion of the transportation service involved in connection with freight interchanged with Seatrain (R. 22-32).

C. The Commission's Decision

1. THE MAJORITY DECISION

The Commission after holding hearings, receiving briefs and hearing argument entered an order dismissing the complaint, basing that order upon the decision contained

in its report (R. 32-50). It is this order denying Hoboken any relief which is the subject of this suit.

The Commission decided, in the first place, that Hoboken as a switching line was entitled to receive as its division of the joint through rates involved its full costs of its transportation service in handling the traffic concerned together with a fair return upon its property used therefor (R. 46). With this decision of principle we have no quarrel and it is only in the Commission's application of the principle and the result thereof that we allege that it erred.

The Commission then determined, however, that the only items of Hoboken's expenses to be considered as its costs of handling this freight interchanged with Seatrain were its costs of the switching operations alone. On the basis of this determination it decided that the division of 60 cents satisfied the principle just stated. In reaching this decision the Commission concluded that neither the payments made to Seatrain under the contract, nor any part thereof, constituted a part of Hoboken's "full costs" of handling the freight interchanged with Seatrain, although these payments were required by the contract between Hoboken and Seatrain defining their respective undertakings and obligations, and although it was only pursuant to this contract that Seatrain received and delivered the freight on its cradle in cars, saving Hoboken the operations of loading and unloading, furnishing cars, etc.

The Commission rested its conclusion that the payments under the contract with Seatrain should not be included in Hoboken's costs for which it is entitled to be reimbursed, upon three grounds, each of which, as we submit, was both erroneous in law and without support in the evidence. It held, first, that the payments are not made for anything which is a part of Hoboken's transportation service. Then it decided that while the contract payments, even though not for the performance of part of Hoboken's transportation service, might properly be included in Hoboken's costs for the purpose of determining its divisions if Hoboken could not secure the bene-

fit of the arrangement with Seatrain without the contract payments, nevertheless it did not regard the payments as "necessary" to secure the savings and benefits from the interchange. The Commission gave three reasons for this view that the payments were not "necessary" and that the contract could be disregarded: (a) that Seatrain owned Hoboken's stock; (b) that the record did not show that "such payments" had been "exacted or obtained by Seatrain from an independent rail connection"; and (c) that it could be assumed that Seatrain had other reasons than the payments for being willing to continue the interchange arrangement (R. 48, 49). We submit that these reasons are all invalid.

2. THE DISSENTING OPINION OF COMMISSIONER SPLAWN

Commissioner Splawn dissented from the view of the majority that the payments made to Seatrain covered no part of Hoboken's transportation service under the lighterage-free rates, saying (R. 49-50):

> "I take it that the thought here is that such payments cannot be identified as an element of the cost of performing complainant's service. With this I cannot agree.
>
> The facilities employed in the handling of traffic which complainant interchanges between Seatrain and defendants and necessary to the performance of that *transportation service* are available for that purpose only because of Seatrain's exclusive property right in the patented method of handling the traffic. The service performed by *that method* not only *relieves the rail carriers of loading and unloading expense* but *affords other advantages to them* as well as Seatrain, as is *evidenced by the large volume of traffic interchanged* by this means. It admittedly is a *service of substantial value to defendants*, and the method which complainant uses to effect the interchange is likewise of value to it. It is inconceivable that such values can be created without effort and some element of expense.

For such effort and expense *Seatrain is entitled to appropriate compensation.* This the majority refuse to recognize and in effect divert to defendants the economies achieved by Seatrain, thus indirectly depriving the latter of its property." (Italics ours.)

3. ILLUSTRATION OF THE EFFECT OF THE COMMISSION'S DECISION

The situation resulting from the Commission's decision can be illustrated, as it was by the Court below, by assuming a lighterage-free rate of $7 per ton from Buffalo to New York via the Erie Railroad. If the freight is to be delivered to a ship docking at an Erie Railroad pier, the Erie will spot the car, unload the freight and transfer it from the car to the side of the ship or will pay the steamship company or its stevedores for doing so (R. 176, 177, 419), the $7 rate including compensation to it for the expense of these operations. If the freight is to be delivered to a ship somewhere else in the harbor to which it must be moved by lighter, the Erie will unload the freight from the car to a lighter and tow the lighter to shipside at an average expense of from $1.419 to $1.69 per ton (Exhibit "14", R. 482) leaving a net to it of from $5.31 to $5.58. If the freight is to be delivered to a Pan-Atlantic Steamship Co. vessel docking at a pier served by the Hoboken, the Erie will turn the car over to the Hoboken to switch to the pier, the Hoboken will then unload the freight from the car and transfer it to ship's side (generally employing the steamship's stevedores for the purpose and paying them 70 to 75 cents (Exhibit "20", R. 515, 518), and the Erie will pay the Hoboken a division of $1.35 (60 cents for switching and 75 cents to reimburse it for its unloading and handling cost (R. 135). The Erie railroad revenue would thus be $5.65. However, if the freight is to be delivered to Seatrain, the Erie, under the Commission's decision, will pay Hoboken a division of only 60 cents to cover nothing but the switching of the car and the Erie will be allowed to keep $6.40 per ton, although its rail service will be precisely the same as that for the

freight delivered to the Pan-Atlantic vessel for which it voluntarily accepts net revenue of only $5.65. Hoboken will either not be able to make any payment to Seatrain under the contract pursuant to which delivery on the cradle was made possible, or, if it makes a payment, its costs will exceed the revenue allowed to it. The Commission reached the conclusion, having this result without considering whether the contract payments were reasonable and, if not, what payments would be reasonable and consistent with the efficient and economical operation of Hoboken in consideration of the benefits to it from the interchange arrangement in labor saving and added traffic. And without going into this very pertinent question, the Commission's decision would allow the entire saving in labor expense and benefit to be kept by the Erie which did nothing to bring them about with no benefit to the shipper, Hoboken or Seatrain. The money paid by the shipper to cover the unloading expense would be in the wrong person's pocket.

Bearing in mind that this proceeding relates only to lighterage-free rates charged to shippers for railroad transportation to and from the port,* the situation under the Commission's decision would be that the railroads would

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* There is not involved the division of joint through rates for rail and water transportation to which Seatrain is a party. On freight interchanged with Seatrain moving under lighterage-free rates, to whose division between Hoboken and its trunk line connections the proceeding relates, Seatrain charges separate rates for its water transportation. It is true, as stated in the brief of railroad appellants (pp. 10-11), that when the complaint was filed there were a few joint through rates for rail and water transportation maintained jointly by Seatrain and the railroads and these were referred to in Hoboken's complaint to the Commission. However, the Commission did not attempt to deal with the division of these rates, confining itself, as its report clearly shows, to the lighterage-free rates. Since the Hoboken's complaint to the Commission was filed, the Commission in *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7 (1938), 243 I. C. C. 199 (1940) has prescribed many joint through rates for through rail and water transportation in connection with the various rail lines and Seatrain. In another proceeding, *Seatrain Lines, Inc.* v. *Akron, Canton & Youngstown Ry. Co.*, I. C. C. Docket No. 28668, which is pending before the Commission, there is involved the question how these

complete their undertaking of accomplishing interchange with a water carrier with less labor and at less expense than the shipper paid for. The Commission's brief in this Court contains various suggestions that since Seatrain has devoted its facilities to the public service it is the shippers who are entitled to any savings in labor and expense made possible thereby. The Commission's decision, however, would not transfer these savings to shippers; they would simply be pocketed by the trunk line railroads, who have contributed nothing to make the savings possible. If the lighterage-free rates charged by the trunk lines to shippers were reduced in an amount reflecting the savings in labor and expense, there would be a basis for the argument of the Commission here, but in its report the Commission indirectly ruled that this should not be done because the rates are group rates. Assuming this latter fact, the only way in which the savings in the labor required of the railroads to complete their undertaking could be transferred to shippers would be for the railroads to compensate Seatrain for accomplishing these savings, in which event it might be argued that Seatrain's charges for its water transportation should reflect the benefits of the payments to it. Under the Commission's decision, however, neither

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joint through rates should be divided between Seatrain on the one hand and the railroads, including both Hoboken and the trunk line railroads, on the other hand. The determination in this latter proceeding will not, however, dispose of the issues in the present suit before this Court for two reasons: first, the new proceeding before the Commission involves only the division as between Seatrain on the one hand and the railroads on the other and does not involve the question as to how the railroad portion of the rates should be divided between Hoboken and the trunk line railroads; and, in the second place, that proceeding relates only to rates on a portion of the interstate traffic involved, whereas there is a greater volume of freight interchanged with Seatrain which is transported to and from Cuba, where the charges for rail and water transportation, respectively, are necessarily separately maintained and where the lighterage-free rates are charged for the rail transportation to and from Hoboken. There also remains a considerable volume of interstate freight which normally moves under so-called combinations of separately published rates rather than joint through rates. This was explained to the Court below (R. 73-77).

Seatrain, whose enterprise and facilities brought about the labor saving for the railroads, nor Hoboken, which entered into the arrangement with Seatrain, nor the shippers would receive the benefit of the savings, which would all be retained by the trunk lines, who contributed nothing thereto and who perform no greater service in connection with Seatrain freight than in connection with freight interchanged by Hoboken with break-bulk water carriers, where the trunk lines allow Hoboken a division of $1.35.

D. The Action in the Court Below

Following the denial by the Commission of a petition for reconsideration and for further hearing (R. 5), the Hoboken, on August 27, 1940, instituted its suit in the Court below to set aside and annul the decision and order of the Commission dismissing its complaint. By its petition it sought an order of the Court directing the Commission to reinstate the proceedings before it, and to consider and make a determination as to the value (if any) of the savings and benefits to Hoboken from the interchange arrangement, to determine what would be reasonable compensation to be paid by Hoboken to Seatrain therefor (if it concluded that the payments provided by the contract were not reasonable and consistent with efficient and economical operations), and to determine the divisions of the lighterage-free rates to be paid to Hoboken by its trunk line connections on the basis of including such reasonable payments in Hoboken's costs.

Its petition alleged that the Commission's decision and order were erroneous as a matter of law in various respects and were arbitrary and in disregard of the evidence and that the Commission erroneously failed to consider and make a determination and findings on essential questions within its jurisdiction.

E. The Decision of the Court Below

The specially constituted District Court after twice hearing argument and considering the record before the Commission which was offered in evidence handed down

its opinion and entered its findings of fact, conclusions of law and decree.

(a) In its opinion it first decided:

"The question of where transportation by rail ends is an administrative question. * * * The finding by the Commission that rail transportation ends at the cradle when Hoboken has put the car consigned for Seatrain upon it and begins at the cradle when the movement is reversed is fully supported by the evidence (citing the contract between Hoboken and Seatrain). * * * The Commission, therefore, held that the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost. Upon this finding, supported by evidence, its judgment is final." (R. 115, 116)

* * * * *

"However, the issue at bar is not predicated solely upon Hoboken's legitimate costs. The entire inquiry should be directed to securing 'a fair and equitable division' of the rates. Conceding *arguendo* that the contract between Hoboken and Seatrain does not constitute a valid obligation to be considered in determining Hoboken's costs, that does not necessarily mean that there is no obligation upon Hoboken to make some payment for the interconnection which saves Hoboken the labor and costs of loading and unloading freight. The Commission should have determined the *quantum meruit* of the relationship. It is possible that there was no service or relationship of value. Even such a finding would not necessarily result in a dismissal of the complaint. If there is a windfall in the case at bar by reason of Hoboken's right under its contract to use the Seatrain devices to fulfill its obligations of carriage, the Commission should determine that fact and also an equitable basis for division of the windfall between Hoboken and the trunk line carriers. This the Commission has failed to do by appropriate findings." (R. 117)

* * * * *

"If the Commission should find that the Seatrain devices are an efficient aid to railroad transportation, the Commission should evaluate the worth of the devices to Hoboken and a legitimate payment therefor; in short, including in the base upon which Hoboken's fair return is calculated, the true value of the Seatrain devices. In effect, the Commission, as a representative of the public interest and the public would set the value of the contract and the Seatrain devices to Hoboken. It should likewise determine a division of the through rate which would not be unduly prejudicial or preferential to any of the parties." (R. 118-119)

(b) The lower Court further held that the Commission had not made necessary findings, saying:

"The act directs the Commission to inquire into the facts and to prescribe just and equitable divisions and not unjustly to prefer or prejudice any party. There was no evidence presented to show that the granting of the entire saving of the loading or unloading of the cars was not an undue emolument for the trunk line railroads. The Commission's remark that the defendant's rates were based on average costs scarcely constitutes a finding as prescribed by the Act. The Commission merely stated in conclusion that such divisions are not unduly preferential. Where there is a lack of basic findings, the court need not examine the evidence and spell out conclusions of fact, Florida *v.* United States, 282 U. S. 194, 215. Likewise, where the evidence does not support the findings, the holding of the Commission should not be sustained. Colorado *v.* United States, 271 U. S. 153; New England Divisions Case, 261 U. S. 184, 204. Our holding on this point obviates the necessity for inquiring into the due process issue raised by the plaintiff." (R. 118)

(c) And it ended its opinion with the holding:

"The Order of the Commission of July 24, 1939 will be set aside and the Commission is directed to reinstate

the proceedings before it and to make findings of fact as indicated by this opinion and to issue and enter a report in the proceedings and to make such an order or orders therein as may be required by law." (R. 119)

(d) In its conclusions of law, it said:

"3. The Commission erred as a matter of law in not making a finding as to whether or not reasonable payment to Seatrain for the benefits derived by Hoboken and through Hoboken by the trunk lines from the interchange with Seatrain and the use by Seatrain of its patented devices in connection therewith, is part of Hoboken's costs of operation under efficient operation in the transfer of freight between the trunk lines and Seatrain, when on such freight the trunk lines charge their lighterage-free or shipside rates, and have the obligations and undertakings for which they are compensated by such rates.

"4. The Commission erred as a matter of law and failed to carry out the duty imposed upon it by the statute, to give due consideration 'to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property' in that the Commission failed to consider and make a finding as to whether relationship between Hoboken and Seatrain was in the interest of the efficient operation of Hoboken as a rail carrier, and failed to consider and make a finding as to what payment by Hoboken to Seatrain would be reasonable compensation, consistent with such efficient operation, for the benefits derived by Hoboken and the trunk lines from the interchange arrangement with Seatrain, to be included in Hoboken's costs for which it is entitled to be reimbursed by the divisions paid to Hoboken by the trunk lines.

"5. The Commission erred as a matter of law and failed to carry out the duty imposed by the statute of

determining whether or not the divisions were unjust, unreasonable, inequitable or 'unduly preferential or prejudicial as between the carriers * * *' in that the Commission failed to direct its attention to the problem of the equitable division of the 75¢ saving occasioned by the interconnection with Seatrain.

"6. The order of the Commission dismissing Hoboken's complaint should be set aside and annulled and the Commission should be directed (a) to reconsider the decision; (b) to determine whether or not the relationship between Hoboken and Seatrain is of value; (c) if the Commission should find that the relationship is of value, to determine the amount of that value to be allowed in establishing Hoboken's legitimate costs; (d) to make a finding as to whether or not the allowance to the trunk line carriers of the entire saving of 75¢ per ton occasioned by the use of the Seatrain interconnection is 'unduly preferential or prejudicial as between the carriers'; and (e) if the Commission should find that the allowance of the entire 75¢ to the trunk line carriers is unduly preferential or prejudicial, to determine an equitable division of the 75¢." (R. 125-127)

(e) Its decree ordered:

"that the Interstate Commerce Commission reinstate the proceedings before it, reconsider its decision, make findings of fact as indicated in the opinion of this Court dated November 24, 1942, make conclusions of law, and issue and enter a report in the proceedings and make such order or orders as may be required by law." (R. 128)

F. Later Developments.

We believe that this Court should be informed of two developments which do not now appear from the record before it.

1. THE EFFECT OF THE WAR ON SEATRAIN'S OPERATIONS.

As stated in the Commission's brief (p. 55), the vessels of Seatrain were diverted, at the direction of the government or by requisition, to other services, and since about February 1, 1942 have not been operating to and from Hoboken. The crane, also, has been transferred to Florida to be used in connection with the operation of one of the vessels between Florida and Cuba at government direction. Hence, at the present time there is no Seatrain traffic moving to and from Hoboken. The Court will doubtless take note of the fact that break-bulk ships formerly operating in the coastwise trade have also been requisitioned or diverted to war uses.

We agree with counsel for the Commission that this does not render the case moot, since the rates are on file with the Commission, the divisional basis complained of stands, and these will be operative again if and when Seatrain's vessels return to their former service and Seatrain re-establishes its terminal and terminal facilities at Hoboken. All parties desire a final determination of the issues.

2. THE BANKRUPTCY OF THE HOBOKEN.

On July 26, 1943 a petition for reorganization under Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), was filed by the Hoboken in the United States District Court for the District of New Jersey and was approved by that Court. A trustee has recently been designated by the Court, but at the time this brief is written, his appointment has not been approved by the Interstate Commerce Commission so that he has not yet entered into possession and taken over the operation of the Hoboken. At the present time the Hoboken is being operated by the owning corporation for and under the orders and direction of the Court, by whose direction, also, this brief is filed.

Whether, as a result of the reorganization, Seatrain will continue to own the stock of the company operating

Hoboken's properties only the future can tell. Until the reorganization is accomplished, or the proceeding dismissed, whatever control Seatrain had of the Hoboken is ended, and it will be the concern of the District Court and of its trustee what terms and conditions can be offered to and arranged with Seatrain to re-establish its terminal at Hoboken when its vessels are once more available to it. This Commission's decision as it now stands or as it should be modified will control those terms.

Summary of Argument

The lighterage-free rates include compensation to the railroads for the expense of loading freight into and unloading it from railroad cars in making interchange with a water carrier. Under contracts between Hoboken and Seatrain, the latter has established its New York terminal at a pier served by the Hoboken and in consideration of certain payments by Hoboken to it has agreed to interchange freight with Hoboken in cars on its cradle, this method of interchange being made possible through the use of Seatrain's special facilities. By this means Hoboken is saved from the labor and expense of loading and unloading freight and has secured a large volume of new traffic. The Commission has ruled, however, that the payments by Hoboken to Seatrain under the contract are not a part of Hoboken's costs of railroad transportation for which it should be reimbursed by its divisions of the lighterage-free rates. The Commission reached its conclusion without considering and making a finding as to whether the payments are reasonable and consistent with the efficient and economical operation of Hoboken in consideration of the savings and benefits obtained by it. As a result of that ruling, the trunk lines, having collected lighterage-free rates from shippers, would keep the entire benefit of the savings resulting from not having to load and unload cars. Neither the shippers, Hoboken nor Seatrain would receive any benefit. This conclusion cannot be right. The Court below correctly directed the Commission to re-open the proceeding for reconsidera-

tion and to make such findings on the questions which the Commission disregarded. In so doing, the lower Court did not substitute its judgment for that of the Commission as to a matter peculiarly within the latter's field, but instead directed the Commission to exercise its functions under the Act.

POINT I. The appellants' arguments that the Court below erred in sending the proceeding back to the Commission for reconsideration and further findings rest upon unsound premises.

A. The major premise on which appellants' arguments rest is that the determination by the Commission of the point of physical interchange settled the question whether the payments were made for something related to Hoboken's transportation service as a railroad and that since the determination of the interchange point was a matter peculiarly within the function of the Commission, its decision was conclusive. This premise is erroneous. There is no dispute as to the point of interchange, which is fixed by agreement between the Hoboken and Seatrain. Payments are not made by Hoboken for a part of Seatrain's operations as a water carrier but in consideration of the benefits derived by Hoboken itself in enabling it to complete its railroad obligation of interchanging freight with a water carrier without the labor and expense of loading, unloading and handling the freight and furnishing cars and in consideration of the added traffic secured by Hoboken from having Seatrain establish its New York Harbor terminal at a pier served by it.

B. Appellants' assumption that the payments to Seatrain are to reimburse it for its expenses of loading and unloading its vessels as a part of its service as a water carrier is incorrect because it disregards the fact that Seatrain's facilities and method of interchange accomplish two purposes: they facilitate

transferring cargo between Seatrain's vessels and the pier, a steamship operation, and they also save the labor and expense of loading freight into and unloading it from cars, a railroad operation. It is the latter for which payment is made by Hoboken.

The effect of the Commission's decision is that the trunk line railroads who collect from shippers lighterage-free rates, including compensation to them for the expense of loading and unloading cars, will be permitted to retain the same divisions as if such expense had actually been incurred by them, whereas Hoboken and Seatrain, whose arrangement and facilities eliminates the necessity of such expense, will receive no compensation or benefit therefrom.

C. The lower Court by accepting as final the Commission's determination that the cradle constituted the point of interchange was not precluded from deciding that the Commission erred in excluding any payment by Hoboken to Seatrain from Hoboken's costs of completing its railroad obligation or from sending the proceeding back to the Commission with instructions to consider and determine the reasonable payment to be paid by Hoboken and included in its costs, consistent with its efficient management and operation, in consideration of the benefits and savings in labor and expense accruing to it from the interchange arrangement.

D. The briefs of appellants contain various statements which are either incorrect or not germane and tend to confuse the issues. The argument that the Commission decided that the division of 60 cents was adequate and covered Hoboken's full cost ignores the fact that the Commission itself recognized that the division of 60 cents covers only Hoboken's cost of switching alone and is inadequate to cover Hoboken's costs if any payment to Seatrain is properly included therein.

Further arguments contained in appellants' briefs comparing Hoboken's revenues with those of the trunk

lines are beside the point and are misleading. They fail to explain on what theory the trunk line railroads who perform exactly the same service on freight delivered to Hoboken for interchange with Seatrain as on freight delivered to it for interchange with a break-bulk water carrier can properly pay Hoboken 75 cents less and retain for themselves 75 cents per ton more on the former traffic than on the latter out of the same rates. They also fail to tell the Court, as the record shows, that after paying Hoboken the divisions which it claims on Seatrain traffic, the revenues of the trunk lines per car mile will still be greater than their average revenues on other freight transported by them.

POINT II. The Commission failed to do what was required of it when it dismissed the Hoboken's complaint without considering and making a determination as to the value to Hoboken and its trunk line connections of the interchange arrangement with Seatrain and what would be reasonable compensation therefor consistent with the efficient and economical operation of the Hoboken, to be included in Hoboken's costs and to be reimbursed by it by the divisions to be paid to it by the trunk lines out of the lighterage-free rates. The reasons given by the Commission for its decision did not justify its non-action. The Court below correctly sent the proceeding back to the Commission.

A. In assuming that its determination of the point of physical interchange settled the issues before it and excused it from valuing and determining the reasonable compensation to be paid by Hoboken for the benefits and savings to it resulting from the interchange arrangement, the Commission erred in disregarding the fact that it is only by virtue of the contracts with Seatrain under which payments were called for that Hoboken is enabled to complete its undertaking to receive and deliver freight on the cradle without loading freight into or unloading it from cars. The interchange of freight in cars without loading

or unloading involves not only the use of the cradle as the point of interchange, to which Seatrain agreed only pursuant to the contract providing for payments to it, but also involves numerous liabilities and responsibilities for the cars and other matters which require agreement between Hoboken and Seatrain. Hence, it could not properly be said that without such agreements, including the agreement for payment, interchange could be accomplished without Hoboken's having to load or unload the freight into or from the car. Whether the contract payments are excessive and improvident or are consistent with the economical operation of Hoboken was a matter which the Commission should have considered and decided.

B. The Commission erred in excluding the payments from Hoboken's costs on the ground that the contract providing for the payments was between a subsidiary and parent corporation and therefore (as the Commission erroneously assumed) could not be regarded as having any binding effect. Instead the Commission should have treated the contract as binding and as imposing costs upon Hoboken unless there was evidence (which there was not) that the contract was entered into fraudulently or that the payments provided in the contract were excessive or improvident. The Commission should have made a finding on this latter question and the Court below correctly returned the proceeding to the Commission for such a finding.

C. The Commission erroneously assumed that Seatrain had not secured an agreement for compensation for the benefits provided by its method of interchange from any independent railroad and that therefore it was not necessary for Hoboken to agree to such payments in order to secure these benefits.

D. In excluding any payment to Seatrain from Hoboken's cost on the ground that the payments were

not necessary, the Commission not only assumed arbitrarily and without any evidence in the record that Seatrain, for reasons of its own and without compensation would *give* all the benefits of its interchange arrangement and the savings in labor and expense to the Hoboken and its trunk line connections, but also erroneously substituted its judgment for that of Hoboken's management as to the necessity for the contract and the payments in order to secure the benefits of the arrangement.

POINT III. The decision and order of the Commission, in determining the divisions to be received by Hoboken in an amount less than its full cost, would take its property for public use without just compensation, in violation of the Fifth Amendment.

The effect of the Commission's decision is to require Hoboken to continue to handle freight for its trunk line connections to and from Seatrain's vessels for a division of only 60 cents per ton, which is less than its cost of performing the service provided some payment to Seatrain is properly included in such costs.

POINT IV. The decision of the Commission if permitted to stand would be contrary to the public interest and to the declared policy of Congress in regard to the administration of the Interstate Commerce Act, since it would be a precedent discouraging improvements in the art of transportation if those developing such improvements could be compelled to give to others without compensation the entire benefits which the improvements produce.

CONCLUSION. The decision of the specially constituted District Court should be affirmed.

Argument

The Commission, following principles of recognized application in determining divisions of joint through rates under Sections 1(4) and 15(6) of the Interstate Commerce Act, said (R. 47):

> "we agree that, in determining the divisions which a short-line railroad should receive out of joint rates with trunk line connections for switching service * * * the full cost of the service, including a fair return, should be the test * * *."

If the payments provided in the contract with Seatrain (or any payments to Seatrain for the benefits derived by Hoboken from the interchange arrangement) are part of Hoboken's "full cost" of its service under the lighterage-free rates, then the division of 60 cents which the trunk line railroads have allowed to it, and which the Commission, by its dismissal of Hoboken's complaint, has permitted to stand is less than Hoboken's "full costs", and the decision of the Commission has done violence to the controlling principle thus stated by it. Its effect is either to require Hoboken to transport Seatrain freight for revenue less than its expense, or compel it to break its agreement with Seatrain and withhold the payments to it in consideration of which Seatrain has agreed to the interchange arrangement.

The Court below decided that the Commission erred in excluding the payments to Seatrain from Hoboken's "full cost", and in thereby deciding that the division of 60 cents is remunerative and reasonable, without having considered and made a finding as to whether the payments are reasonable and consistent with the efficient and economical operation of the Hoboken as consideration for the savings and benefits accruing to Hoboken and its trunk line connections from the interchange arrangement with Seatrain and if not, what amount (if any) it would be reasonable and proper for Hoboken to pay for these savings and benefits.

We shall first examine the arguments advanced by appellants in their briefs in support of their claim that the Court below was in error in setting aside the decision and sending the proceeding back to the Commission for consideration and findings on the points referred to and for reconsideration of its conclusion in the light thereof. And we shall then consider more fully the decision of the Commission itself and the defects therein.

POINT I

The appellants' arguments that the Court below erred in sending the proceeding back to the Commission for reconsideration and further findings rest upon unsound premises.

With all respect, it is submitted that the arguments in the briefs of the appellants proceed from premises or assumptions which are entirely erroneous. In large part these are repetitions of similar errors into which the Commission fell when it failed to consider the matters and make the findings for which the Court below has directed that the case be remanded to it.

A. **The major premise upon which the arguments in the briefs of both appellants rest, that the Commission's determination of the point of interchange was final, settled everything and excused the Commission from considering the reasonableness of the payments to Seatrain, is unsound.**

The argument in both briefs of appellants is, in effect, that the Commission settled everything when it determined that the service of Hoboken for itself and its trunk line connections under the lighterage-free rates begins and ends when freight is received by Hoboken or delivered by it in cars on Seatrain's cradle. From this it is argued that since the determination of the extent of a railroad's service covered by its rates is a matter peculiarly within the

function of the Commission as to which its decision will not be disturbed by the courts, consequently the Court below could not consistently accept the Commission's determination on this point and yet set aside the Commission's order and send the case back to the Commission to consider and make further findings.

However, if the only question were the point of interchange of freight between Hoboken and Seatrain, there would have been no proceeding before the Commission, because on this question, there was no controversy. Hoboken and Seatrain, by agreement themselves fixed the point of interchange as Seatrain's cradle, as the Court below found (R. 116), and the Commission merely adopted what they had agreed to—and based its determination upon, and to that extent gave effect to the agreement. Moreover, we do not dispute the proposition that if there had been a controversy as to the point of interchange of freight in railroad cars and the extent of the railroad service which a shipper could demand under the lighterage-free rates, the Commission's determination of the controversy would have been final if supported by evidence, *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156.

But the determination of the point of interchange did *not* settle the matters as to which the Hoboken sought findings and relief from the Commission. Or at least it did not settle them, unless certain essential facts may be ignored.

The facts which exist and which the appellants in their arguments seek to ignore, as did the Commission, are: (1) that the cradle is available as a point of interchange and that freight may be interchanged in cars there, relieving Hoboken of the labor and expense of furnishing cars, of loading freight into and of unloading it from cars and of handling between shipside and cars only because Seatrain, pursuant to the contract, has so agreed; (2) that in the fulfillment of its obligation to perform the railroad operations necessary to receive from or accomplish delivery of freight to a ship, the Hoboken by virtue of the arrangements with Seatrain receives bene-

fits in that by being able to receive and deliver in cars on the cradle, it can complete its railroad obligation without incurring the labor costs for loading, unloading and handling which it would otherwise have and for which the shippers pay when they pay the trunk lines their lighterage-free rates; (3) that the Hoboken receives still further benefits in the additional traffic which it has secured from having Seatrain locate its New York Harbor terminal at a pier served by it and agreeing with it on a non-break-bulk method of interchange, which added traffic the Hoboken sorely needed;* (4) that part of the consideration for the payments to be made by Hoboken to Seatrain under the contract was these benefits to Hoboken which are certainly directly related to its railroad operations.

It is only by ignoring these substantial consequences for Hoboken in its railroad operations, by looking narrowly only at the movement of the cars as they are taken by the locomotive from or to the cradle and by forgetting that it is solely by reason of the interchange arrangements, including the contracts (Exhibits 11 and 19), that the movement of the cars fulfills the Hoboken's obligation to shippers that an argument is made that the decision that the cradle is the interchange point settles everything.

B. The appellants' assumption that the payments to Seatrain are made to reimburse it for its expenses of a vessel operation and not in consideration of the benefits to Hoboken and the trunk lines in their railroad operations is incorrect.

Not only do the appellants' arguments involve ignoring facts which do exist; they are likewise premised on the assumption, as a fact, of something which is not so. Throughout both briefs it is assumed, stated and reiter-

* The evidence showed that in 1936 freight interchanged by Hoboken with Seatrain amounted to 9670 cars, as compared with only 5291 cars of other freight handled by it. In 1937 the Seatrain interchange provided Hoboken with 9633 cars of freight while its other business totaled only 6166 cars (Exhibit "46", R. 606).

ated that the payments to Seatrain are to reimburse it for its own expense of loading and unloading its vessels. It is asserted that therefore the payments are for a ship operation and are not related to a railroad operation so as to be a proper part of the Hoboken's costs of its railroad service.

Obviously the crane and cradle are used by Seatrain in loading and unloading its vessels. They correspond, as has been agreed by the Hoboken from the beginning, to the booms and tackle of break-bulk vessels, and the contract so indicates. Admittedly also, the method of interchange which these facilities and their use make possible has advantages for Seatrain as a water carrier. But to say that for these reasons the payments are made as compensation only for a ship operation and not for anything which affects the Hoboken's operations as a railroad, is both to ignore completely the terms of the contracts and to disregard the benefits to the Hoboken from the added traffic it obtained and from the elimination of the loading and unloading of cars which admittedly is necessary without the facilities of Seatrain. There can be no question that the payments are to be made, not to reimburse Seatrain for loading and discharging its vessels, but in consideration of the "benefit" accruing to the Hoboken and its trunk line connections. This is clear from the contracts and the uncontradicted oral testimony (Exhibits "11", R. 50, "19", R. 53; R. 212, 213, 224-232) as the Commission itself recognized.

What the appellants fail to appreciate is that Seatrain's terminal facilities achieve a double purpose, accomplishing benefits for *both* ship and railroad. They simplify and expedite the steamship operation of loading and discharging Seatrain's vessels, but they also produce a saving in labor and other benefits for the railroad—and it is for these latter that Hoboken agreed to pay. A fanciful example may serve to illustrate the fallacy of the appellants' assumption.

Suppose there are two railroads, X running from A to B with a gauge of five feet and Y running from B to C

with a gauge of six feet. In handling through freight, it is obviously necessary for the X railroad to unload freight from its cars and place it at a designated point between the ends of their respective tracks and then for the Y railroad to provide cars to fit its rails and reload the freight from the platform to these cars. The X railroad then invents or, by paying royalties, procures patent rights to a type of car with adjustable axles which can be lengthened or shortened so that the same car can be used over the tracks of both railroads. It says to Y, "We will place our special cars in service in handling through freight over our two lines and will install a connecting track and facilities for changing the gauge of the cars at a point between the ends of our respective lines which shall mark the point of interchange between us. This will involve expense to us in acquiring the special type cars and the interchange facilities but it will save labor for both of us—for us in unloading freight from the cars and getting rid of the empty cars and for you in furnishing empty cars and loading freight into them—and besides, by providing a through service which will eliminate handling the freight at the interchange point, it will attract to both of us a large volume of new business in the transportation of breakable commodities. We will enter into this arrangement with you if you will pay us a certain amount of money commensurate with the savings and benefits which will accrue to you." Can it be doubted under these circumstances that there would be good consideration for the payments to be made by the Y railroad to X? It certainly could not be claimed that the payments were for something having no relation to the railroad operations of Y merely because the devices were also used by and affected the operations of X. As a matter of good business, Y would be warranted in agreeing to pay any amount up to its cost of interchanging freight under the old method and might well be warranted in paying the full amount of such cost in consideration of the added traffic to be expected from the arrangement. The fact that the physical operation of adjusting the length of the car axles might take place

on X's side of the agreed interchange point would not warrant a conclusion that the device was used only by X in completing its operations and had no effect on the operations of Y. And a finding as to the point of interchange would not settle Y's obligation to pay X or determine whether the payments would be legitimate operating costs of Y.

Similarly here, the fact that Seatrain's crane is used to transfer a car on the cradle from the hold of Seatrain's ship to Hoboken's track on the pier alongside does not mean that the extent of the railroad operations for which the shippers pay the lighterage-free rates are not thereby altered or that the payments which Hoboken contracted to make to Seatrain were not related to this alteration of its railroad operations and the benefits which it derived in connection therewith.

Counsel for the Commission, in their brief, go even further in the wrong direction than did the Commission itself in its decision. On page 18 of the Commission's brief, it is said:

> "But the payments are not for any benefit to the rail lines under the rail rates, but are for water transportation services beyond and in excess of anything covered by the rail rates applicable to and from Seatrain's car cradle."

Not only is this assertion incorrect for the reasons just stated but it is also contrary to the decision of the Commission itself. For the Commission recognized that the rail lines received a benefit and that the payments were intended as compensation therefor. Thus the Commission said that there was before it a question whether the payments may be justified

> "as compensation properly payable to Seatrain for the *savings* which it has accomplished for the rail lines by its new method of transfer. The new method of transfer puts the connecting rail lines to less expense under the lighterage-free rates than the old method." (R. 48) (Italics ours.)

This is certainly a *benefit*. And later in its report the Commission said that unless the trunk lines make a payment

> "they will receive an unearned *benefit*. This comes about from the fact that this new method makes it unnecessary for the rail lines to perform all the service which they hold themselves out to perform under the lighterage-free rates." (R. 48)

The decision of the Commission was, therefore, not as its counsel now states, that "the payments are not made for any benefit to the rail lines", but rather that the payments, although intended to be payments for the benefits obtained by Hoboken under the contracts, were not "*necessary* for this purpose", since, as the Commission erroneously assumed, Hoboken could expect to receive these benefits without paying for them. It was this reasoning which led the Commission to its final conclusion that the payments were not a necessary part of Hoboken's costs and that it need not evaluate the benefits nor determine what would be reasonable compensation for Hoboken to pay therefor consistently with efficient business management.

Pursuing the assumption that the payments are made to Seatrain for loading its vessels and not for the savings and other benefits accruing to the Hoboken and the trunk line railroads, the brief of the Commission here, contrary to the Commission's own decision, asserts (p. 18) that "Seatrain is seeking to be paid twice for its patented device" and that having "devoted its patented device to the public use" it "may not look to the preceding rail rates to add to its compensation".

The fallacy of this argument can be exposed by referring again to the fanciful X and Y railroads with their different gauges. X, of course, charges a shipper its rate for transportation from A to B and in the performance of that transportation uses the patented car with the extensible axle which saves it the labor of unloading the freight at B, an operation covered by the rate. Y likewise charges the shipper its rate for transportation from B to C which includes compensation for loading the freight

into a car at B. Y pays X for the use of the car and for its elimination of this loading expense. Is it fair to say that, therefore, X is "paid twice for its patented device," once by the shipper and once by Y? On the theory of the Commission's argument, Y could have the use of the patented car and the savings produced by it for nothing, because the shipper had paid X its tariff rate and X had used the car in transporting freight over its line from A to B. Of course, this is not sensible.

Moreover, in contrast with the fallacious remark in the Commission's brief that by demanding from Hoboken a payment in consideration of establishing the interchange arrangement with it "Seatrain is seeking to be paid twice for its patented device", the actual result of the Commission's decision is that the railroads who have collected lighterage-free rates from shippers to compensate them for the cost of loading and unloading freight will be permitted to retain payment for a service and expense which they do not incur and from which they have been relieved by the Seatrain interchange arrangement.

C. The Court below, having accepted as final the determination by the Commission as to the point of interchange and the extent of the railroad operations covered by the railroads' rates, did not err, as appellants contend, in sending the case back to the Commission for further consideration and a determination as to the value to Hoboken and its trunk line connections of the savings in labor and expense and the added traffic resulting from the agreement with Seatrain and as to the reasonable compensation to be paid by Hoboken to Seatrain therefor as part of Hoboken's costs.

The railroad appellants, in their brief, endeavor to make much of the fact that in its opinion the Court below concluded:

> "Since, as the Commission determined, transportation ends at the cradle, Hoboken completes its obligation under the lighterage-free tariff when it delivers

> the cars to the cradle. The Commission, therefore, held that the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost. Upon this finding, supported by evidence, its judgment is final." (R. 116)

And these appellants assert (Brief, p. 39):

> "Having accepted as conclusive the controlling findings in the case, as made by the Commission, the District Court should have dismissed plaintiff's petition."

Considered by itself out of its context, the sentence quoted by appellants from the opinion of the District Court, may appear to imply an acceptance by that Court of the Commission's finding that no payment by Hoboken to Seatrain for anything under the contract would be a legitimate part of Hoboken's costs for which it would be entitled to reimbursement in the divisions paid to it by its trunk line connections. But it is clear from the opinion as a whole that the Court below did not intend such an inference as to its conclusions to be drawn from the quoted language. Plainly what the lower Court meant was that it accepted the Commission's decision that since the cradle was found to be the point of interchange the payments could not be considered compensation for any physical operations beyond that point. The cases cited uphold only the finality of a decision of the Commission determining the physical limits of a railroad service covered by its rates. *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402. They do not hold that the Commission may, without being subject to review by the courts, fail to consider and make a finding as to whether the operations and costs necessary to make a sufficient delivery at the determined interchange point are reduced by some contractual arrangement which has been entered into by the railroad, or that it may fail to make a finding as to the reasonableness of the consideration called for by such a contract when the matter before the Commission in-

volves the measure of reasonable divisions to be received by the railroad in the light of efficient and economical operation and management.

It is plain, therefore, that the lower Court, although accepting as final the Commission's determination as to the interchange point, did not hold that it was bound to accept the Commission's determination that no payment whatever by the Hoboken for the savings in labor and expense which it secured from the arrangement in performing its railroad transportation obligation and for the added traffic which it obtained from the arrangement would be a legitimate part of its railroad costs under efficient and economical management.

There was therefore no inconsistency in the action of the lower Court in accepting as final the Commission's finding as to the interchange point and yet directing the Commission to reopen the proceeding to consider and make a further finding as to the amount of compensation consistent with efficient management which Hoboken should pay for the benefits derived by it from the interchange arrangement with Seatrain.

In any event, however, this Court is obviously not bound by the lower Court's language, and may itself pass independent judgment on the Commission's action. And it seems clear that the question as to whether or not certain items of expense should be included in a carrier's costs for the purpose of determining rates and divisions is one upon which the decision of a regulatory tribunal cannot be conclusive and binding on the courts. *West Ohio Gas Co.* v. *Comm'n.*, 294 U. S. 63, 74; *Driscoll* v. *Edison Co.*, 307 U. S. 104, 120.

D. The briefs of appellants contain statements in other respects which are either incorrect or are not germane and tend to confuse the issues.

It would unduly extend this brief to attempt to answer page by page the briefs of the appellants or correct the impressions which other statements therein contained may leave with the Court. Therefore, one or two further exam-

ples must suffice to indicate how far these briefs may tend to lead the Court from the real issues involved and the pertinent and correct facts.

(1) In an attempt to explain away the fact that when a shipper pays the lighterage-free rates he pays to the railroads compensation for labor and expense of loading and unloading cars, an attempt is made to have it appear that under the lighterage-free rates there is no "separate and independent tariff obligation" to load and unload cars because the railroads are not in all instances called upon to perform this operation (Commission's brief, p. 36; railroad appellants' brief, p. 55). The important fact here, however, is that the lighterage-free rates which shippers pay to the railroads *include compensation to them for loading and unloading*, whether the operation is actually performed in every instance or not (R. 176; *Lighterage Cases*, 203 I. C. C. 481). Moreover, as is correctly stated at page 6 of the Commission's brief,

> "Under the lighterage-free rates the service which the railroads hold themselves out to perform includes the unloading of inbound cars and the placing of the lading within reach of ship's tackle and a corresponding but reverse service on out-bound freight." (citing R. 47)

and the "rail rates exacted from shippers" which are not under attack "presumptively yield adequate compensation when the 75 cents for the unloading service is expended by the railroads" (Commission's brief, p. 29).

(2) It is then said in the Commission's brief (p. 36) that in the interchange with Seatrain the only railroad

> "obligation or undertaking is completely satisfied and extinguished when the freight is placed at or removed from the car cradle."

and that this is so because

> "Seatrain does not want to load or unload railroad freight cars"

since its devices permit it to handle freight in cars. It is true, of course, that Seatrain's vessels are designed to transport freight in railroad cars and its facilities are devised to accomplish transfer of freight in cars between its vessels and railroad piers. However, it does not follow from this that Seatrain would have established its terminal at Hoboken and would have agreed to assume all of the responsibilities of handling cars and to make its cradle available as an interchange point without a contract providing for compensation to be paid to it by Hoboken. It located at Hoboken only pursuant to a contract and it cannot be assumed that Hoboken could have procured Seatrain's location there without a contract. Seatrain might have gone to some other carrier that would have entered into a similar contract with it. In fact, as will be pointed out again later herein, the record shows that Seatrain has not established a service at any port where its interchange arrangement has resulted in savings for the railroads without obtaining consideration for such savings and for the benefits to the rail carriers.

(3) Despite the fact that under the Commission's decision the trunk line railroads out of an assumed rate of \$7* (see *supra*, pp. 19-22) would retain \$6.40 if the freight were to move by Seatrain as compared with only \$5.65 if the freight were to be forwarded via a break-bulk line docking at Hoboken or even less if delivery to the ship were to be accomplished by lighter, appellants argue that the Court below erred in concluding that the railroads would receive a windfall. The Commission itself, in its report, recognized that "they will receive an unearned benefit" (R. 48).

It is contended by appellants, however, that there is no windfall because the lighterage-free rates cover a wide variety of terminal services. This is true and the fact that the rates are thus made on what is commonly called a "group" basis might be a reason for not immediately

* The railroad appellants in their brief (pp. 70, 71) object to the District Court's use of an assumed rate of \$7, but the result would be similar whatever figure is used.

passing on the savings to shippers in the form of lower rates on freight to be delivered to Seatrain than on freight to be delivered to a break-bulk carrier. However, this circumstance does not negative the fact that under the Commission's decision, the railroads, having done nothing on their part, would receive greater compensation on Seatrain traffic than on other traffic for both of which they would collect from shippers in the lighterage-free rates sufficient compensation to cover the labor and expense of loading and unloading. The group method of rate-making does not prevent the adjustment as between carriers of such savings so that those who accomplish the savings and produce the benefits for others will receive the fruits of their enterprise. This is recognized by the railroads themselves in the allowances which they pay to various steamship lines, as shown by the record in the proceeding before the Commission (R. 177, 423).

(4) On this same point, the brief for the railroad appellants, on page 54, quotes from the report of the Commission to the effect that:

> "a similar unearned benefit would accrue if a steamship company now docking on the Manhattan water front and served by lighter should shift to a dock with direct rail connections on the Jersey shore."

It was admitted by a trunk line railroad witness, however, that when a steamer, docked at one place, is moved to a railroad terminal, thereby saving the railroad the necessity of lightering freight to the vessel, there is a tariff providing for the payment by the railroad "of certain shifting allowances" (R. 419). Moreover, if a vessel moves from a New York City pier on the Manhattan side of the harbor to a railroad pier on the New Jersey side, it is only the railroad owning the pier which receives any saving since other railroads must still reach the vessel by lighterage or by absorbing the connecting railroads' charges plus the terminal service charge of the railroad serving the pier as shown in its tariff. *Lighterage Cases,*

203 I. C. C. 481, 497. Furthermore, it is probable that the railroad at whose pier the vessel would dock would furnish the pier to the vessel without charge since it is not the general practice for railroads to make a charge for the vessels docking at their New Jersey piers for the use of the pier (R. 419). Even more than this, as the Erie Railroad witness testified, not only would there be no charge for the piers, but in various cases the railroads pay allowances to steamship companies or to the steamship companies' stevedores (R. 423).

(5) At various points in the Commission's brief, it is asserted or implied that the payments from Hoboken to Seatrain are to reimburse it for the royalties which it pays on its patents and it is claimed (p. 41) that "there is no obligation on Hoboken to pay for Seatrain's patent rights." What has been said under heading "B" above is an answer to the contention that such is the purpose or effect of the payments. On pages 40 and 41 of their brief, counsel for the Commission go farther and after stating that Seatrain pays approximately $50,000 a year in royalties on its combination patents, they indulge in computations from which they would have it appear that the payments to Seatrain under the contract would amount to $93,235 a year. However, as the record shows, a great deal more expense than the patent royalties is involved in accomplishing the benefits enjoyed by Hoboken from the interchange arrangement. But what is even more serious, the imputation that by the increased divisions of the lighterage-free rates which it seeks, the Hoboken "is claiming for the benefit of Seatrain * * * $93,235.70 per year" is incorrect and a gross exaggeration. In computing the sum of $93,000 counsel for the Commission apparently failed to notice that the figure of 9,633 cars interchanged with Seatrain in 1937, which is the basis of their computation, is not limited to cars interchanged with the trunk lines but includes a very large number of cars originating and terminating locally on the Hoboken, as to which obviously there is no question of divisions with the trunk lines or of

reimbursement by them (Exhibit "46", R. 606). The payments by Hoboken to Seatrain under the contract in connection with cars moving under through lighterage-free rates on which increased divisions are sought would be much less than the amount suggested by counsel for the Commission.

(6) The briefs of both appellants attempt to justify the Commission's decision on the ground that, after all, the division of 60 cents really is adequate and cannot be considered confiscatory and that, therefore, it is to be assumed that the Commission did evaluate the benefits derived from the contract.

(a) The first point argued in this connection in the brief of the railroad appellants (pp. 66 ff.) is that the Hoboken presented its case on the theory that it should receive a uniform amount per ton regardless of the balance left for its trunk line connections. This is correct, but Hoboken had no alternative since the divisions on all other freight which have been in effect since 1920 under agreement with the trunk lines themselves have been on this basis. Moreover, Hoboken is a switching line and it is usual for the charges of switching carriers to be on a uniform basis to cover their costs. *Rochester Switching Case*, 95 I. C. C. 30, 45; *Switching Rates in Chicago Switching District*, 195 I. C. C. 89, 115.

(b) Next it is argued in both briefs that the Commission found that the division of 60 cents was sufficient to cover Hoboken's costs. True, the Commission found (R. 41). "The record warrants the conclusion that the former division of 60 cents and the present division of 63 and 66 cents are sufficient to cover the cost of the service performed by complainant." The Commission's report makes it clear, however, that its finding was based solely on its assumption that no payments to Seatrain were to be considered part of Hoboken's costs and that the 60 cents covered simply the costs of Hoboken's switching operations

alone. After referring to the division of 60 cents, the Commission said (R. 38):

> "Whether it is entitled to a greater division out of the lighterage-free rates depends in large part on whether certain payments which complainant makes to Seatrain may be properly included in its costs for performing its part of the rail transportation to and from Hoboken."

The Commission's whole report leaves no room for doubt that it was its finding that if any payment to Seatrain was to be considered part of Hoboken's legitimate costs, the division of 60 cents would not cover such costs and Hoboken's operations would be conducted at a loss.

(c) The railroad appellants then compare figures as to Hoboken's revenues with revenues left for the trunk lines. It must be remembered, however, that the rates are established by the trunk lines and if they are not adequate to cover the costs of a switching line whose services are necessary to complete the trunk lines' obligations and leave a fair return for the trunk lines, this is a matter for which the switching line cannot be blamed. The Commission expressly found, moreover, that there was "no proof that the joint rates in question are on an unremunerative level" and that, therefore, the divisions to Hoboken as a switching carrier should be fixed in an amount to cover its full costs.

It is said (p. 72) that with the division of 60 cents Hoboken for its short switching movement receives 15 per cent of the total revenue for an average rail haul of 258 miles and that this proves that this division was not unjust or unduly prejudicial to Hoboken, and on the next page reference is made to certain selected figures indicating the percentages of the total revenue which Hoboken would receive if its division were made $1.35 per ton. The Court will appreciate that the expense per mile of a terminal switching line operating in a congested metropolitan area is not to be compared with the per mile expense of

a line haul movement and that if a terminal switching carrier's costs are to be covered it must receive a much greater proportion of the total revenue than is represented by any mileage ratio, *New England Divisions Case*, 261 U. S. 184; *Rochester Switching Case*, 95 I. C. C. 30, 45; *Chicago Switching Case*, 195 I. C. C. 89, 115.

Moreover, the appellants do not explain what justification there is for them to retain 75 cents per ton more out of lighterage-free rates on freight interchanged with Seatrain than they voluntarily accept out of the same rates on freight interchanged with a break-bulk steamship company or than remains to them after their terminal operations on freight which they, themselves, lighter to and from shipside.

In these comparisons of revenue figures, furthermore, the railroad appellants fail to tell the Court, as the evidence shows, that after paying to Hoboken the division of $1.35 per ton sought by it out of the lighterage-free rates, the average revenues remaining to the trunk line railroads would be 35.54 cents per car mile or substantially more than the average revenue of 20.99 cents per car mile which they earn on other freight interchanged with the Hoboken under divisions agreed to by the trunk lines, and even more in excess of their average revenues per car mile on all traffic (Exhibit "24", R. 524; R. 277-279).

(d) The Commission's brief likewise attempts to show that the division of 60 cents must be adequate by asserting that it represents an increase of 215 per cent over the allowance of 20 cents per ton in effect prior to July 1, 1918 and that had this old division of 20 cents been increased in accordance with the general rate increases, the present divisions would be 38, 40 or 42 cents. The record before the Commission shows, however, that the division of 60 cents which is the established division, when the Hoboken is called upon only to switch freight, and the division of $1.35 which it receives when it assumes the cost of loading or unloading were established in 1920 as a compromise of litigation which was instituted because the old division of 20 cents was inadequate (R. 159). Moreover, the ref-

erence to the early division of 20 cents does not negative the fact that the Commission has here found that 60 cents is a compensatory division only where Hoboken's obligation is limited to switching and that it is not sufficient to cover as a part of Hoboken's cost any expense for loading or unloading or any payment to Seatrain for relieving it from such expense and for the benefits which Hoboken receives under the interchange arrangement.

In final answer to these figures and other features of appellants' arguments, it may be said that they would be pertinent for discussion here only if this Court were to substitute its judgment for that of the Commission on what the figure of the Hoboken's divisions should be. This, of course, is not the matter before the Court. Such arguments can be designed, therefore, only to divert the Court from the central issue—which is, whether the Commission was right in excluding any payment to Seatrain from Hoboken's costs for the purpose of fixing its divisions, without considering the value of the benefits for which the payments are made and without deciding whether the arrangement calling for some payment was consistent with the efficient and economical operation of the Hoboken.

POINT II

The Commission failed to do what was required of it when it dismissed the Hoboken's complaint without considering and making a determination as to the value to Hoboken and its trunk line connections of the interchange arrangement with Seatrain and what would be reasonable compensation therefor consistent with the efficient and economical operation of the Hoboken, to be included in Hoboken's costs and to be reimbursed to it by the divisions to be paid to it by the trunk lines out of the lighterage-free rates. The reasons given by the Commission for its decision did not justify its nonaction. The Court below correctly sent the proceeding back to the Commission.

From a consideration of the underlying fallacies of the arguments of the appellants, we turn now to consider the decision of the Commission itself. This, too, to a considerable extent reflects the same fallacies, but the Commission attempted to buttress its dismissal of Hoboken's complaint with other reasons which must be examined and which, we submit, will be found equally without merit.

A. **The Commission's determination that the cradle marked the point of interchange between Hoboken and Seatrain did not settle the matter; neither did it justify a disregard of the contract, nor excuse the Commission from valuing and determining the reasonable compensation to be paid by Hoboken for the benefits and savings to it in performing its rail service and in being able to interchange on the cradle.**

The Commission, after stating that the railroads under the lighterage-free rates hold themselves out to load and

unload cars and place and receive freight within reach of ship's tackle, went on to say in connection with interchange with Seatrain (R. 47):

> "The unloading or loading of the car lading and its delivery or receipt at ship's tackle is therefore unnecessary. The rail lines do all that is required when they place the cars in or take them from the Seatrain cradle. From this point of view the payments which complainant makes to Seatrain cover no part of its transportation service under the lighterage-free rates and are in addition to the full costs of that service."

In regarding this finding as determining the issues, the Commission rested its conclusion on the same assumption which constitutes the basic premise of appellants' argument, considered in the previous point, and what is there said regarding appellants' contention is equally applicable to the decision of the Commission. What the Commission failed to find, as required by the evidence before it, was that it is only by virtue of the contract between Hoboken and Seatrain that the cradle is made the point of interchange and that the railroads are able to "do all that is required when they place the cars in or take them from the Seatrain cradle."

Let us consider the matter first in connection with freight brought in by a steamship and then to be transported by railroad to the interior. If Seatrain should see fit to deliver freight to Hoboken on its pier loose and not in a car, either because it did not choose to turn over to Hoboken the car which it had used for the movement of the freight or because it had elected not to use its facilities at its port of loading to place the car on the ship but had carried the freight loose in the ship's hold, Hoboken would clearly be under an obligation under the lighterage-free rates to furnish the car required for rail movement and to load the freight into the car.

Therefore, by bringing the car with the freight, by using its special car elevator and its patent rights to de-

liver the car to Hoboken along with the freight and furnishing Hoboken with the freight already loaded in the car, Seatrain actually fulfills for Hoboken a part of Hoboken's transportation obligation and undertaking. And Seatrain does these things under the terms of the contract and it is for these that the payments to Seatrain are made. We submit that the payments *are* directly related to Hoboken's transportation operations as a railroad. They are for saving the labor cost and other expenses which Hoboken would otherwise have in fulfilling its transportation obligation and for increasing Hoboken's volume of business.

The Commission, as we see it, confused the extent of the railroads' transportation undertaking and obligation to the shipper of the freight who has paid lighterage-free rates with the physical operations and labor required to carry out the undertaking. We submit that the contract does not diminish the Hoboken's transportation undertaking and obligation to a shipper paying the lighterage-free rates, but provides another means for fulfilling that obligation which eliminates labor expense which would otherwise be necessary. The fact that the contract saves Hoboken the physical operation of placing an empty car and the labor of loading the freight into the car does not alter the extent of Hoboken's transportation obligation to provide a car, load the freight into the car for rail movement, or alter the fact that the shipper has paid for this. It is a strange conception that something which eliminates labor otherwise necessary to fulfill an obligation diminishes the extent of or eliminates the obligation to the patron.

Hoboken can fulfill its obligation without having itself to furnish a car and provide the labor necessary to perform the physical loading of the freight into the car only by reason of its contracts with Seatrain. This must be plain on reflection. Thus Seatrain in bringing freight from New Orleans or Havana to Hoboken already loaded in a railroad car, has thereby become responsible to the owner of the car for the safety of the car and for the payment of rental

thereon. Obviously, Hoboken could not compel Seatrain to turn the car over to it along with the freight without some agreement between Hoboken and Seatrain with regard to responsibility for the car. Moreover, Seatrain could not have gotten the freight on board its ship at New Orleans or Havana already loaded in the car nor made it available to Hoboken loaded in the car on its cradle at Hoboken without the use of its car elevators and its patents.

Furthermore, since there have been contracts between Hoboken and Seatrain governing the interchange between them of freight in cars from the beginning of Seatrain's establishment of its terminal at Hoboken and every car which Seatrain has delivered to Hoboken has been delivered or received under the terms of such a contract, it cannot be assumed that Hoboken could fulfill its undertaking under the lighterage-free rates to furnish a car and have freight loaded in a car at its expense for movement to the interior without a contract, or that in the absence of such a contract Seatrain would continue to deliver freight to Hoboken already loaded in cars.

With respect to freight originating at an interior point and transported to Hoboken for delivery to a Seatrain ship, the situation is the same. The switching carrier switching cars to the steamship pier must complete the transportation undertaking of the trunk line railroads under their lighterage-free rates. This means doing everything necessary to place the freight in the possession of the steamship in such a way as to obligate the steamship to accept and transport it to its ultimate destination. *N. Y. Central R. Co. v. The Talisman*, 288 U. S. 239, 241 (1933). What constitutes delivery of freight to and its acceptance by a carrier may be determined either by general custom where there is a custom, or by agreement where there is none.

In an early case, *Texas & Pacific Ry. Co. v. Clayton*, 84 Fed. 305, affirmed in 173 U. S. 348, the Circuit Court of Appeals for the Second Circuit said (p. 308):

"What constitutes a sufficient delivery to the connecting carrier is sometimes a doubtful question. A manual transfer of possession is not essential. A constructive change of possession from the first to the second carrier may amount to a delivery. It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, *at any place where the second carrier has control of them, conformably with usage created by the course of the business between the two carriers*, is a sufficient delivery, and discharges the first carrier." (Italics added.)

We submit that without some arrangement between Hoboken and Seatrain, by virtue of which Seatrain has agreed to accept freight in a car on its cradle and use its crane and facilities for the loading of the freight on its vessel in the car, Hoboken could not fulfill its obligation by merely placing the car where a captain of a Seatrain vessel could look at it. In *Seaboard Air Line Ry.* v. *Friedman*, 128 Ga. 136, the question was whether the placement of a car by one railroad upon a transfer track of another constituted an acceptance of the car by the latter sufficient to discharge the former from its obligation. The Court held it did not, saying (p. 318):

"Under these conditions the mere placing of the car on the 'transfer track' was not a delivery to the defendant. Under the custom proved, and in the absence of some affirmative act by some authorized agent of the defendant, amounting to an acceptance of the car, the placing of the car on the 'transfer track' was a mere tender; and delivery thereof would not be complete before it was actually accepted by the train crew of the defendant's road, to carry it upon its route."

In assuming that by merely placing the car alongside Seatrain's ship without an agreement Hoboken would thereby accomplish interchange and complete delivery and that Seatrain would accept the freight in that

way, the Commission proceeds contrary to the evidence of record. There is no proof of any custom, apart from the contracts, from which it can be found that without the contracts Seatrain has agreed to accept freight in a car placed on its cradle, hoist the car aboard its ship with its facilities and transport the freight in the car. For the evidence shows that from the very beginning of Seatrain's operations there have been contracts between Hoboken and Seatrain fixing the point and method of interchange between them and determining their respective liabilities and obligations, including Hoboken's obligation to pay Seatrain for the benefits accruing to it.

Furthermore, Hoboken for its part could not be expected to turn a car over to Seatrain without some undertaking from Seatrain with respect to the car. Hoboken is responsible to the railroad owning a car for the safekeeping of the car and for the payment of compensation for the use of the car until such time as the car comes into the possession of another railroad obligated by the so-called Car Service and Per Diem Agreement to take over these responsibilities. Seatrain, as a water carrier, has not been permitted to become a signatory of the Car Service and Per Diem Agreement governing payment by railroads for the use of each other's cars. Therefore, Hoboken could very properly refuse to allow a car to be taken aboard a Seatrain ship unless and until it had secured Seatrain's undertaking to reimburse and save it harmless from its obligations with respect to that car. This is provided by the contracts and is one of the undertakings by Seatrain for which the payments to it are consideration.

Therefore, it is the contract itself which enables Hoboken to complete its transportation service by the placement of the car on the cradle alongside Seatrain's ship, and the payments, which are Hoboken's consideration for the contract, are costs incurred by it in performing its transportation service.

It is conceded, however, that a carrier may enter into an improvident contract and that however binding the ob-

ligation of the contract may be upon it, the Commission may properly refuse to allow it to include payments under the contract in its costs for the purpose of arriving at the divisions to be allowed to it by its connections. For Section 15(6) of the Interstate Commerce Act requires that

> "In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, * * *."

And plainly whether a particular contract calls for payments in excess of the benefits received by the carrier is a matter which goes to the efficiency with which the carrier is operated.

We submit, therefore, that the Commission, instead of disregarding the contracts altogether and erroneously assuming that the Hoboken could fulfill its obligations under the lighterage-free rates by a mere switching of the cars without any arrangement with Seatrain, should, instead, have considered and determined whether the payments called for by the contracts were reasonable in consideration of the benefits accruing to Hoboken thereunder and were consistent with the efficient operation of Hoboken and if it reached the conclusion that the payments were excessive, should have determined how much thereof would be consistent with efficient operation on Hoboken's part. But this the Commission failed to do, and it is for this that the lower Court has remanded the proceeding to it.

This failure becomes the more serious in view of the fact, to be considered under the next point, that the Commission apparently treated the contracts as nullities in view of the corporate relationship between Hoboken and Seatrain.

B. **The fact that after the preliminary agreement between Hoboken and Seatrain, Seatrain had acquired Hoboken's stock did not deprive the contracts entered into between them, embodying the principles of the preliminary agreement, of all binding effect upon Hoboken. The Commission's decision that because of the stock ownership the contracts could be ignored and it could be assumed that Hoboken could expect all of the savings and benefits thereunder without paying any consideration and that therefore it need not determine what would be reasonable consideration to be included in Hoboken's costs was erroneous in law and arbitrary.**

The Commission does not describe the reasoning which has led to its conclusion, but its emphasis upon "the control which Seatrain exercises over complainant" indicates that if there were no relationship of stock ownership or common directors—as if, for example, Hoboken had entered into a contract with Pan-Atlantic Steamship Corporation obligating Hoboken to make payments to Pan-Atlantic on freight delivered to or received from it in consideration of Pan-Atlantic's using special facilities and relieving Hoboken of operations which would otherwise be required in accomplishing the interchange of the freight—the Commission would have regarded the payments under such a contract as part of Hoboken's full costs of performing its transportation service under the rates to be divided.* This suggests that the Commission regards a contract between a subsidiary corporation and a parent corporation as having no binding or obligatory effect upon the subsidiary.

There can be no doubt that there was ample consideration for the payments to Seatrain in the benefits received by Hoboken under the contracts and in the undertakings and expenses incurred by Seatrain in affording those benefits to Hoboken. In 1932, when Seatrain was making ar-

* Indeed Hoboken has such a contract with a subsidiary of Pan-Atlantic under which it pays it 70 cents a ton on freight interchanged with Pan-Atlantic, and when it incurs this expense it receives a division of $1.35, which takes this into account (Exhibit "20", R. 515).

rangements for the location of a terminal in New York Harbor, Hoboken was in bad financial condition and desperately in need of additional business. Seatrain, whose ships and facilities would provide a new method of rail-water transportation without breaking bulk at the ports, offered decided attractions to shippers and promised a substantial volume of new business. That this promise was justified is shown by the figures from the evidence, included by the Commission in its report, where it found that in 1936 freight interchanged by Hoboken with Seatrain amounted to 9,670 cars out of the total of 14,961 cars handled by Hoboken in that year. In 1937, Hoboken interchanged with Seatrain 9,633 cars of freight out of a total of 15,799 carloads handled by it (R. 36). Furthermore, by reason of the arrangement with Seatrain, Hoboken was enabled to handle this freight efficiently and economically, and was saved the necessity of furnishing cars for inbound shipments or of disposing of cars containing freight moving in the other direction.

Under these circumstances, and in the complete absence of any proof or even claim of fraud or other improper use by Seatrain of its stock control, we submit that to treat the contracts as imposing no obligation on Hoboken and to assume that although Hoboken has entered into the contracts, it is not "necessary" for it to make the payments which it has agreed by the contracts to make, amounts, in effect, to denying the existence of the separate corporate entities and their capacity to contract with each other. Obviously, the entire body of corporation law cannot be thus set at naught.

United States v. *Del., Lack. & West. R. R.*, 238 U. S. 516, 527;

Taylor v. *Standard Gas & Electric Co.*, 96 F. (2d) 693 (C. C. A., 10th Cir.).

In the case first cited, the Court said (p. 528):

"* * * Many private corporations have both stockholders and officers in common, yet *they may*

nevertheless make contracts which will bind both of the separate entities." (Italics ours.)

In *Kentucky Electric Power Co.* v. *Norton Coal Mining Co.*, 93 F. (2d) 923 (C. C. A., 6th Cir., 1938), the Court said (p. 926):

> "On the other hand, it is likewise well settled that a corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative or fiduciary relationship between the two. If such stock ownership and potential control be resorted to only for the purpose of normally participating in the affairs of the subsidiary corporation in a manner usual to stockholders and not for the purpose of taking some unfair advantage of the subsidiary or using it as a mere adjunct to the main corporation or as a subterfuge to justify wrongdoing, their identity as separate corporations will not be disregarded but *their respective rights when dealing with each other in respect to their separate property will be recognized and maintained.*" (Italics ours.)

There is neither claim, proof nor finding that the situation in the present case comes within the principle of those decisions where the courts have held that the separate corporate entities should be disregarded when the corporate control has been improperly used for the injury of third parties.

Conceiving, apart from any such question of corporate relationship, that the determination of divisions presents a question of fairness and equity to the several parties to the through transportation, Hoboken offered evidence before the Commission which clearly showed that divisions for Hoboken based upon including in its costs the contract payments to Seatrain would not work unfairness or inequity to the trunk line railroads. Indeed, we believe that

the evidence shows, on the contrary, that divisions for Hoboken which do not regard the contract payments to Seatrain as a part of Hoboken's costs would do inequity in according to the trunk lines more than a reasonable share of the total transportation revenue. As the Commission expresses it (R. 48), the trunk lines thereby "will receive an unearned benefit".

The evidence before the Commission shows that after paying to Hoboken a division of a lighterage-free rate sufficient to reimburse it for the payments to Seatrain as well as its other costs in connection with the traffic, the earnings remaining to the trunk lines out of the rates will be as great as their earnings from the rates on similar traffic interchanged with Hoboken and delivered to or received from vessels of the Holland-America Line, Pan-Atlantic Steamship Corporation and other water carriers. They will also equal or exceed the revenues which the trunk lines have when they themselves make shipside delivery after paying their costs of lighterage service or after making payments which they themselves make to steamship lines who take over part of the physical operations incident to interchanging freight with vessels.* Accordingly, it certainly cannot be said that Seatrain has used its control of Hoboken to compel it to enter into contracts whose enforcement will do injury or injustice to the third parties concerned, the trunk lines, and that for this reason the contracts may be disregarded as evidence of the necessity on Hoboken's part to make the payments called for thereby if it is to enjoy the fruits of the contracts.

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* The Erie Railroad pays the Dollar Line 3 cents per 100 pounds for unloading freight from cars at Pier 9, Jersey City. Also, there was an arrangement between the Erie and the Arnold Bernstein Line in connection with the handling of unboxed automobiles, pursuant to which the Erie paid the Arnold Bernstein Line the equivalent of $1.00 per ton for unloading automobiles from cars and placing them on its car elevator. A similar arrangement was in effect between the New York Central and the Black Diamond Line (R. 177-178). Where the railroads interchange freight with steamships by means of lighters, the evidence shows that they incur costs in various amounts ranging from $1.39 to $2.02 per ton (Exhibit "8", R. 461; Exhibit "14", R. 474, 482).

We concede that in a case such as this, the fact of corporate relationship calls for scrutiny of the terms of a transaction from the standpoint of its business wisdom and efficiency, and we urged upon the Commission that it approach the problem from this point of view, but it failed to do so. In this the Commission erred, the more so since it thereby also failed to fulfill its duty under the statute because it made no inquiry or determination whatever as to whether the contracts and the payments thereunder represented acts of efficient business management in the interests of Hoboken.

In order to reach a proper decision on this point, the inquiry of the Commission should have been as to whether, if Hoboken were entirely independent and its stock were not owned by Seatrain, its action in entering into the contracts would have been considered contrary to efficient operation and the payments thereunder extravagant expenses, in the light of which the Hoboken was not entitled to ask that its divisions be determined. Had the Commission made this inquiry, as required by the statute, we submit that its finding should have been that the contracts constituted a wise and business-like deal for Hoboken to enter into in its own interest, and that the payments thereunder were costs incurred in the course of efficient operation.

As we have said, the terms of the original contract were actually agreed to when Hoboken was under independent management, which obviously thought that the contract was a good one for Hoboken. Its advantages to Hoboken are obvious in the large volume of additional freight, previously described, which interchange with Seatrain affords to it and in the savings which it enjoys in handling that traffic.

In the Commission's brief, it is said (p. 42):

> "The corporate relationship of the contracting parties is of legal significance only to the extent that it explains the reason for the existence of the contract."

Just what is meant by this sentence it is difficult to understand. The brief continues:

> "The situation would be exactly the same, and equally objectionable, if Seatrain were not the parent corporation and did not own a single share of Hoboken's capital stock."

Counsel for the Commission, however, disregard the language of the Commission's own opinion, for the Commission expressly recognized that there was nevertheless a question

> "whether such payments may be justified • • • as compensation properly payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer. The new method of transfer puts the connecting rail lines to less expense under the lighterage-free rates than the old method. It may be argued, therefore, that they would be justified in making any payments that might be necessary for the purpose of inducing the establishment of the new method of transfer, provided they were left with a net saving." (R. 48)

It was in considering whether the payments were "necessary" to secure these savings for Hoboken that the Commission held that the contract was "not evidence to this effect, in view of the control which Seatrain exercises over complainant" (R. 48).

Certainly, therefore, the case may not properly be presented to this Court on the assumption indicated in the Commission's brief herein, that if Seatrain and Hoboken had been entirely independent the Commission would have regarded the contracts as no proof that the payments thereunder were necessary to secure for Hoboken the benefits of the interchange. This point is emphasized by the next sentence of its report, in which the Commission asserted:

> "No such payments have, so far as the record shows, been exacted or obtained by Seatrain from an independent rail connection." (R. 48)

Finally, on this point it may be remarked that the fact that Hoboken is now in reorganization and is being operated under the direction of the Court pursuant to Section 77 of the Bankruptcy Act, of course, eliminates the factor of control by Seatrain for the present at least.

C. The Commission's decision that it need not consider what would be reasonable compensation to be paid by Hoboken for the savings and benefits to it because, as the Commission concluded, there was no evidence that any other independent railroad had agreed to pay compensation to Seatrain, was arbitrary, contrary to the evidence and contrary to other evidence which the Commission's Examiner excluded. Moreover, the Commission has since arbitrarily and erroneously refused to reopen the proceeding to receive such evidence.

If it were true that no similar consideration had been secured by Seatrain elsewhere for the use of its facilities and for the benefits to a railroad of an interchange arrangement with it, this might cast doubt upon whether it was the part of efficient operation for Hoboken, either with or without Seatrain's stock ownership, to enter into a contract to make payments to Seatrain. But certainly this would not in any way alter the binding effect of the contract itself.

However, the Commission's finding or assumption that Seatrain "exacted" no such payments from an independent rail connection was contrary to the evidence.

The fact is, as the uncontradicted testimony before the Commission shows, that such payments were "exacted" from Hoboken itself and agreed to by Hoboken when it was itself "an independent rail connection" and before Seatrain ever acquired a share of its stock (R. 226-232). Evidence was also offered, which the Commission's Examiner erroneously excluded, that before negotiations were entered into between Hoboken and Seatrain, Seatrain considered locating its terminal on the properties of one or another

of the trunk line railroads reaching New York Harbor and conducted negotiations with this in view, and that one of the essential terms of the negotiations to which no trunk line took exception was that the trunk line should make payments to Seatrain in consideration of Seatrain's use of its facilities and the benefits accruing to the railroad therefrom (R. 210-222).

The record shows that various of the trunk lines make payments to steamship lines in connection with services performed by the latter in the interchange of freight between them (R. 177, 178, 423), and that Hoboken itself has contracts with steamship lines or their stevedores under which it incurs payments on the basis of which its division of $1.35 is predicated (Exhibits "20", "21", R. 515, 519).

Therefore, if some contract and some payment would have had to be considered a proper part of Hoboken's necessary costs, had it been entirely independent, the only question requiring the exercise of the Commission's discretion should have been whether the payments were excessive and unreasonable. But this is the question which the Commission failed to decide.

True it is that at the time of the proceeding before the Commission no payments in exactly the same form were made to Seatrain by the railroads serving its piers at New Orleans and Havana, which were the only other ports to and from which Seatrain then operated.* The record

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* In this connection, it may be appropriate to apprise this Court, as was done in the Court below, of a circumstance in the proceedings before the Commission which does not appear from the record because it occurred after the Commission had rendered the decision here under review. In the Spring of 1940, Seatrain with two new ships of the same type, established a service between Texas City, Texas, and Hoboken. In view of the remarks in the Commission's report now being discussed, Hoboken then filed a petition with the Commission asking it to reopen the proceeding to receive evidence that Seatrain *had* entered into agreements with the railroads serving Texas City, which were entirely independent of it, pursuant to which they agreed to make payments to Seatrain similar to those contracted for by Hoboken. The Commission refused to reopen the proceeding and denied the petition.

shows, however, that the explanation for this fact at New Orleans was that the New Orleans and Lower Coast Railroad in arranging with Seatrain for the latter's terminal on its line, south of New Orleans proper, saved Seatrain's vessels seventeen miles of steaming in each direction and Seatrain took this saving into account as part consideration for placing its facilities at the service of the New Orleans and Lower Coast. Moreover, Seatrain did enter into a contract with the New Orleans and Lower Coast Railroad governing the terms of the interchange of cars between them.* The evidence before the Commission also showed that at Havana the railroad freight rates do not include any services on the part of the railroads in interchanging freight with steamship lines other than the switching of cars, the unloading of freight from the cars or loading into the cars being operations performed by the shippers or the steamship companies at their expense. Therefore, at Havana the use of Seatrain's facilities did not result in any saving in the operations embraced within the railroads' undertaking.

D. **The Commission's final reason for concluding that the payments are not a necessary part of Hoboken's full costs, namely, that "there is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections" is entirely arbitrary, contrary to and without support in the evidence.**

Here the Commission disregarded what was actually done and substituted its imagination for the facts as to what Seatrain's management might or might not be willing to do. The Commission did not indicate what the "ample

* This contract is further described by the Commission in its report, referred to in its decision herein, in *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 225-226.

reason" was for concluding that Seatrain would do all the things covered by the contract without a contract and without any consideration, or on what facts the "ample reason" rests. The reality is that ever since Seatrain has been at Hoboken and the Hoboken has been interchanging freight with Seatrain, there have been contracts between them. Hence, there is no ground for assuming that Seatrain would enter into the arrangement and maintain its terminal at Hoboken without such contracts and without the consideration provided for therein. But further than this, the evidence of the history of the negotiations prior to the contracts completely negatives the idea that Seatrain would have been willing to use its facilities in saving the railroads labor and expense "regardless of any contributory payments from rail connections." The record contains no evidence that Seatrain conducted any negotiations for a terminal at New York Harbor except on the terms of payment to it, representing compensation from the railroads for the savings in labor and expense derived by them from Seatrain's use of its interchange devices and methods. Moreover, as previously stated, there was offered to the Commission evidence, which the Commission's Examiner excluded (R. 210-222), to show that when Seatrain first contemplated establishing a terminal at New York Harbor, it negotiated therefor with one or more of the trunk line railroads and that it was an essential part of these negotiations that payment should be made to Seatrain on freight interchanged, similar to payments made by the trunk lines to other water carriers for relieving the trunk lines of operations and expenses in completing their railroad transportation service. We submit that it was plainly erroneous and arbitrary to exclude this evidence, but having done so, it was still greater error to proceed to a conclusion which would have been negatived by the proposed testimony.

In these circumstances, far from there being "ample reason to conclude * * * that * * * the Seatrain plan of transportation * * * has sufficient advantages to

impel its use and promotion by Seatrain regardless of any contributory payments from rail connections", reasonable reflection should suggest that no water carrier will be eager to develop improved methods of handling freight, whose use saves labor and expense to the railroads, if it is to have no compensation from the railroads for the benefits which they derive therefrom, and if, as a result, the railroads that have contributed nothing to the improved facilities may expect to pocket the entire savings resulting therefrom. A decision resting on such an assumption results in the money saved by the improved facilities getting into the wrong person's pocket.

Finally, we submit that the following language of this Court in *United Gas Co.* v. *R. R. Comm'n.*, 278 U. S. 300, at page 320, is of important significance in connection with all of the several reasons given by the Commission for its decision. This Court, through Mr. Chief Justice STONE, said:

> "We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere. *Southwestern Bell Telephone Co.* v. *Public Service Comm'n.*, 262 U. S. 276, 288; *Houston* v. *Southwestern Telephone Co.*, 259 U. S. 318."

Thus, as we argued under sub-heading "B", a contract may not be disregarded by a regulatory body and payments provided for therein excluded from a carrier's costs for the purposes of rate making or divisions merely because the contract is one between subsidiary and parent corporation. The language is pertinent further, however,

because it emphasizes that what the Commission did here in rejecting the payments because it considered for various reasons that they were not "necessary" to procure for Hoboken the benefits of the interchange arrangement was, in effect, to substitute its business judgment for that of Hoboken's managers, and this, as this Court said, a regulatory body may not do.

Hence it is submitted that the reasons given by the Commission for its conclusion, which explain its failure to consider and determine the reasonableness of the compensation to be paid by Hoboken for the benefits to it of the interchange arrangement, and its failure to base thereon its determination of the division to be received by Hoboken from the lighterage-free rates were invalid, and the Court below properly directed the Commission to reconsider its decision.

POINT III

The decision and order of the Commission, in determining the divisions to be received by Hoboken in an amount less than its full cost, would take its property for public use without just compensation, in violation of the Fifth Amendment.

Hoboken's common carrier duties and the obligations imposed upon it by the Interstate Commerce Act compel it to transport the traffic offered to it and to join with the other railroads in maintaining joint rates and arrangements and facilities for through transportation, Interstate Commerce Act, Section 1(4). This compulsion imposed by law renders divisions which fail to cover Hoboken's full cost of transportation confiscatory in effect. In *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, at pages 357 and 358, it was said:

> "When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent

of Acts of Congress requiring the carriers to serve for the amounts specified. Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose expropriate the use of carriers' property. If when made the prescribed divisions are or later shall become less than just compensation, the carriers may not be required to serve therefor. And, if after appropriate effort they fail to obtain divisions of non-confiscatory joint rates that do constitute just compensation for their services including the use of their properties, the carriers may by suit in equity have the order prescribing, or requiring to be kept in force, the challenged divisions adjudged void and its enforcement permanently enjoined."

There is no dispute as to this fundamental principle. The Commission itself recognized it in its decision here when it said:

> "Summarizing this discussion, we agree that complainant is entitled to divisions out of the joint rates in question which are based upon the full costs of performing its portions of the through transportation service, including a fair return, but subject to the qualifications above indicated."*

It is in the application of the principle that the Commission went wrong—in determining what are Hoboken's "full costs of performing its portion of the through transportation service". The Hoboken's property was as much taken "without just compensation" and the Commission's decision and order violated the Fifth Amendment as much, when the Commission, although professing an intention to fix divisions which would cover Hoboken's "full costs",

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*The qualifications were that if the total rates were unremunerative, Hoboken would not be entitled to divisions which covered its costs, leaving for the other carriers the entire loss. But there was no evidence or even claim that the rates here involved were unremunerative.

failed to do so because its determination of those costs was erroneous in law or contrary to the evidence, as if the Commission had deliberately set out to prescribe divisions less than Hoboken's costs.

The fact that the Commission's order was negative in form, denying Hoboken relief and dismissing its complaint, does not alter its confiscatory effect upon Hoboken nor deprive the courts of jurisdiction to set the order aside for conflict with the Fifth Amendment. *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125; *Alton R. Co.* v. *United States*, 287 U. S. 229. In the *Baltimore & Ohio* case cited, the Court said (p. 358):

> "Section 15(6) requires the Commission on complaint of any participating carrier to determine whether existing divisions are just, reasonable and equitable and, if not, to prescribe others that do comply with the law. Its denial of relief from existing divisions operates to direct service under them. Though negative in form, the order of denial is affirmative in effect."

Here the Commission's order denying Hoboken's plea for a division in excess of 60 cents operates to direct it to perform its transportation undertaking under the lighterage-free rates in connection with freight interchanged with Seatrain for this division. The expenses incurred by it in connection with such freight, including the payments to Seatrain called for by the contract, will be $1.33 per ton and Hoboken will lose 73 cents on every ton of such freight which it handles. Plainly, a decision having this result takes Hoboken's property without just compensation. Under the Commission's decision, Hoboken's expenses could be kept within the division of 60 cents only if it should breach its agreement and cease to make the payments to Seatrain provided for in the contract pursuant to which the interchange is accomplished. It would then be Seatrain that would be denied compensation. In either event, the result of the Commission's order would be to transfer to the trunk lines without any consideration or

compensation from them all of the benefits and savings resulting from the arrangement between Hoboken and Seatrain and from the use, pursuant thereto, of Seatrain's special facilities in making possible an improved method of interchanging freight between a railroad and a water carrier.

POINT IV

The decision of the Commission if permitted to stand would be contrary to the public interest since it would be a precedent discouraging improvements in the art of transportation if those developing such improvements could be compelled to give to others without compensation the entire benefits which the improvements produce.

The art of transportation is still susceptible of many improvements. Much room remains for the development and introduction of labor-saving devices. This is perhaps especially true in the case of coastwise water transportation.

The United States Maritime Commission in its "Economic Survey of Coastwise and Intercoastal Shipping" (1939) commented at length on labor expense in connection with the interchange of freight between land and water carriers (pp. 24-30). On the theory of the Commission's decision, if a water carrier develops some improvement in the method of interchanging freight with a railroad which saves labor both for the water carrier and the railroad and which offers the promise of opening new channels of commerce, the railroad may not make a payment to the water carrier for the benefits which it receives; or if it does so, it may not have such payments considered a part of its legitimate costs of railroad transportation. We do not suggest, of course, that the right

to payment should be one-sided. If railroads develop methods of interchange which accomplish savings for water carriers in the latter's operations, the railroads likewise are entitled to be compensated. Unless it is recognized that payments may be made to those who develop improvements by those who derive benefits therefrom and that such payments, to the extent they are reasonable, may be included in the costs of the beneficiaries, it seems inevitable that improvements will be discouraged.

The excuse that the rates paid by shippers are what are commonly referred to as "group" rates and are based upon average costs for services of varying extent may be a reason for not immediately passing savings on to shippers in the form of reduced rates, but this is no excuse for ruling that among the carriers themselves those who receive the benefits of savings in labor and have had no hand in developing the means by which these savings are accomplished may nevertheless keep all of the financial rewards, whereas the carriers whose enterprise has produced the improvements will receive nothing except what they may exact from shippers for their own transportation services.

We submit that it is utterly fallacious to say that a payment for saving labor in performing a carrier's undertaking is not a legitimate transportation cost when the expense of the labor thus saved would be. The Commission should determine how much the saving is worth and what is reasonable compensation to pay for the benefits enjoyed from it. This the Commission here failed to do for reasons which we submit were erroneous.

In enacting the Transportation Act, 1940 (54 Stat. L. 899), the Congress wrote into it a declaration of policy directing that the Interstate Commerce Act should be

> "so administered as to * * * promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * *"

We submit that the decision of the Commission herein did not constitute an administration of the Interstate Commerce Act in accordance with this declared policy.

CONCLUSION

The decision of the specially constituted District Court should be affirmed.

Respectfully submitted,

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October 14, 1943.

Appendix

The Pertinent Provisions of the Interstate Commerce Act

The provisions of the Interstate Commerce Act under which the proceeding before the Commission was brought are Section 1(4), providing as follows:

> "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

and also Section 15(6), which is as follows:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received

by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."